United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

SUP. CT. CHIEF JUSTICE HUGHES

1935 Dec 5
Argued

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United States Court of Appeals for the District of Columbia

APRIL TERM, 1935

716

No. 6471

DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT, A CORPORATION, APPELLANT,

vs.

HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES, AND W. A. JULIAN, AS TREASURER OF THE UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED MAY 6, 1935.

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United States Court of Appeals for the District of Columbia

No. 6471

DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT, a Corporation, Appellant,

vs.

HOMER S. CUMMINGS, Attorney General &c. et al.

---

a Supreme Court of the District of Columbia.

In Equity.

No. 57784.

DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT, a Corporation, Plaintiff,

vs.

HOMER S. CUMMINGS, Attorney General of the United States, and W. A. JULIAN, as Treasurer of the United States, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 In the Supreme Court of the District of Columbia
Holding an Equity Court.

No. 57784.

DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT,
a Corporation, Plaintiff,

vs.

HOMER S. CUMMINGS, Attorney General of the United States, and W. A. JULIAN, as Treasurer of the United States, Defendants.

Bill of Complaint.

Filed October 3, 1934.

The plaintiff, Deutsche Bank und Disconto-Gesellschaft, a Corporation, by Thomas H. Creighton, Jr., and Adna R. Johnson, Jr., its attorneys, brings this bill against Homer S. Cummings as Attorney General of the United States and W. A. Julian as Treasurer of the United States and respectively represents:

1. That plaintiff is a corporation duly organized and existing under and by virtue of the laws of Germany with its principal place of business at Berlin, Germany.

2. That defendant Homer S. Cummings is the duly appointed, qualified and acting Attorney General of the United States and is sued herein as incumbent of said office.

3. That the defendant W. A. Julian is the duly appointed, qualified and acting Treasurer of the United States and is sued herein as incumbent of said office.

4. That this is a suit of a civil nature brought under the laws of the United States, namely, an act of Congress known as the Trading with the Enemy Act approved October 6, 1917 and the acts amendatory thereto and all executive orders and acts proclaimed and made in alleged conformity therewith and pursuant to the general jurisdiction and

2 powers of this Court.

5. That heretofore, in or about the year 1929, the Deutsche Bank und Direction der Disconto Gesellschaft, banking corporations organized and existing under the laws of Germany, duly consolidated into a single corporation organized under the laws of the Republic of Germany, to wit, the Deutsche Bank und Disconto Gesellschaft.

6. That after said merger the assets of said Direction der Disconto Gesellschaft became the property of plaintiff herein, Deutsche Bank und Disconto Gesellschaft, under which name the corporation created by said merger did and is still doing business.

7. That sometime prior to March 9, 1928, the then Alien Property Custodian purporting to act under and by authority of the Trading with the Enemy Act as amended, determined the said Direction der Disconto Gesellschaft to be an enemy and pursuant to demands did seize and possess himself of the property of said Direction der Disconto Gesellschaft in the United States, which property now belongs to the plaintiff, Deutsche Bank und Disconto Gesellschaft.

8. That the said property so seized and taken prior to the 16th day of February 1933 was held by the said Alien Property Custodian or deposited by him in the Treasury of the United States to his credit in various trusts and then transferred to a single trust known as Trust No. 49851. The property now being held in said trusts consists of the following:

Fifty shares of South Porto Rico Sugar Company preferred stock;

$115,500 St. Louis San Francisco Prior Lien 4's;

$2,250 U. S. Liberty Bonds, and

Cash in the amount of $541,041.44, together with any and all accrued returnable income.

3 9. That prior to the 16th day of February, 1933, and pursuant to the provisions of the Trading with the Enemy Act as amended and the Settlement of War Claims Act, the plaintiff herein and/or its predecessor filed its notice of claim under oath with the Alien Property Custodian containing such particulars as required by law and by the rules and regulations of the Alien Property Custodian and made application to the President of the United States for the return to it of said property.

10. That prior to the commencement of this action the then Alien Property Custodian determined that the plaintiff herein was the owner of said property and entitled to the return of said property as provided for by the Trading with the Enemy Act as amended by the Settlement of War Claims Act of 1928.

11. That on or about the 16th day of March, 1931, pursuant to a warrant of attachment obtained in an action brought by

William H. Sprunt and others in this Court, against the plaintiff herein, the said property was levied upon by the Marshal of this Court and the return of said property to the plaintiff herein withheld because of the levy of the warrant of attachment.

12. That said action brought by William H. Sprunt and others was on or about the 24th day of May, 1934, by an order of this Court, discontinued and said warrant of attachment by virtue of the discontinuance became non-existent, null and void, and that said discontinuance was requested by plaintiff in said action without the payment of any sums of money or property on the part of the plaintiff herein to said Sprunt and others, the plaintiffs in said action.

13. That after the dismissal of said action brought
4 by William H. Sprunt and others and prior to June 27, 1934, the plaintiff herein made demand upon the Alien Property Custodian for the release to it of the property mentioned herein but the Alien Property Custodian arbitrarily and capriciously and without warrant of law failed and refused to release to the plaintiff said property.

14. That by virtue of an executive order, No. 6694, issued by the President on May 1, 1934, which became effective on July 1, 1934, the office of the Alien Property Custodian ceased to exist and all the authority, rights, privileges, powers and duties conferred and imposed on the Alien Property Custodian by law and/or executive orders were transferred to the Department of Justice to be administered under the supervision of the Attorney General; that all property real and personal, choses in action and all other property of whatsoever kind in the possession or under the control of the Alien Property Custodian or which was held in trust for him by the Treasurer of the United States was transferred to the Attorney General of the United States.

15. That after the abolishment of the office of the Alien Property Custodian and the transfer of all property in his possession or under his control to the Attorney General of the United States as mentioned in the preceding paragraph, and prior to the commencement of this action the plaintiff herein demanded the return of said property from the defendants herein but said demand has been refused upon the ground that pursuant to the provisions of Public Resolution No. 53, providing as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That so long as Germany is in arrears in any payments of principal or interest, including interest at the rate of 5 per centum per annum on principal installments not paid when due, under the debt-funding agreement between Germany and the United States, dated June 23, 1930, with respect to Germany's obligations remaining on account of awards, including interest thereon, entered and to be entered by the Mixed Claims Commission, United States and Germany, all payments, conveyances, transfers, or deliveries of money or property or the income, issues, profits, and/or avails thereof authorized or directed to be made under the Trading with the Enemy Act, as amended, or the Settlement of War Claims Act of 1928, as amended, whether or not a judgment or decree has been entered with respect thereto, shall be postponed and the money or property, or the income, issues, profits, and/or avails thereof reserved: Provided, however, That such of the funds as are from time to time available (without taking into consideration interest thereafter accruing) under the Settlement of War Claims Act of 1928, as amended, for the payment of principal and interest upon awards of said Mixed Claims Commission shall be applied when available to the payment of principal and interest upon such awards in the same manner and to the same extent as though certain of the payments provided for in said Act had not been postponed under this Resolution: Provided further, That the President may, in his sole discretion, remove the restriction as to any of the cases or classes of cases in relation to which payments, conveyances, transfers, or deliveries have been postponed under this resolution: And provided further, That the President is authorized to determine, for the purposes of this resolution, the period or periods in which Germany is in arrears in the payments hereinbefore described, and his determination thereof shall not be subject to judicial review."

the return of said property was being withheld.

16. Upon information and belief the plaintiff alleges that said Public Resolution No. 53 is contrary to the provisions of the Constitution of the United States and is null and void in that it attempts to deprive the plaintiff herein of its rights, privileges and properties secured to it by the Consti-

tution of the United States, to wit, it deprives plaintiff of its property without due process of law in contravention of amendment Five of the said Constitution.

Wherefore, the Plaintiff Prays:

(1) That a subpoena issue out of this Honorable Court directed to the defendants Homer S. Cummings as Attorney General of the United States and W. A. Julian as Treasurer of the United States, commanding them and each of them to appear herein and answer this Bill of Complaint.

6 (2) That upon a final hearing of said cause a decree be entered herein directing the return of said property, to wit:

Fifty shares South Porto Rico Sugar Company preferred stock;

$115,500 St. Louis San Francisco Prior Lien 4's;

$2,250 U. S. Liberty Bonds, and

Cash in the amount of $541,041.44 together with any and all accrued returnable income.

(3) That all proper orders and decrees may be made and proper inquiries directed, and that all such other and further and general relief may be afforded plaintiff as the nature of the case may require, and as to the Court may seem meet and proper.

DEUTSCHE BANK UND DISCONTO GESELLSCHAFT,
By THOS. H. CREIGHTON, JR.,
Attorney.

DISTRICT OF COLUMBIA, SS:

I, Thomas H. Creighton, Jr., being first duly sworn depose and say that I am the attorney of record for plaintiff herein which is a corporation organized and existing under and by virtue of the laws of Germany; that all of the officers of said corporation are absent from the District of Columbia; that I have read the foregoing Bill of Complaint by me subscribed as attorney of record for the said plaintiff and have knowledge of the things therein contained; that the statements made therein as of my own personal knowledge are true and those made upon information and belief I believe to be true.

THOS. H. CREIGHTON, JR.

Subscribed and sworn to before me this 3rd day of October, 1934.

MARY H. SHADRICK,
Notary Public, D. C.

[SEAL]

My commission expires April 25, 1939.

7 *Motion to Dismiss.*

Filed October 24, 1934.

* * * * * * *

Now come the defendants, Homer S. Cummings, as Attorney General of the United States, and W. A. Julian, as Treasurer of the United States, and move this honorable Court to dismiss the bill of complaint upon the ground that this Court has no jurisdiction to entertain the plaintiff's bill because, by Public Resolution 53, 73d Congress, amending the Settlement of War Claims Act of 1928, approved by the President on June 27, 1934 (48 Stat. 851), the return of the property of the plaintiff as prayed for in said bill of complaint has been postponed and the money or property and the income, issues, profits, and avails thereof reserved.

GEORGE C. SWEENEY,
Assistant Attorney General,
LESLIE C. GARNETT,
United States Attorney,
HARRY LEROY JONES,
Attorney,
Attorneys for the Defendants.

Received a copy of the foregoing motion to dismiss and of the defendants' memorandum of points and authorities in support thereof this 24th day of October, 1934.

THOS. H. CREIGHTON, JR.,
Solicitor and Attorney for Plaintiff.

8 *Memorandum of Court.*

Filed March 12, 1935.

* * * * * * *

I think that Congress has full power to dispose of enemy property seized by the Alien Property Custodian, and make such changes in regard to that disposition as may from time to time seem advisable. The courts have uniformly held that a suit against the Alien Property Custodian is a suit against the United States, and have also held that Congress may grant and may withdraw the privilege of bringing suit against the United States. When that privilege is withdrawn, the courts are powerless to act.

I can see nothing unconstitutional in the withdrawal by Congress of this privilege, and the motion to dismiss the bill of complaint should be sustained.

BAILEY, *J.*

Order and Decree.

Filed March 29, 1935.

* * * * * * *

This cause coming on to be heard before me on the defendants' Motion to Dismiss the Bill of Complaint filed herein, and the parties hereto being represented by their respective counsel, and after argument upon the questions raised by said Motion, and the Court being fully advised in the premises, it is this 29th day of March, 1935,

Ordered, adjudged and decreed that the said Motion to Dismiss the Bill of Complaint be, and the same hereby is, sustained and that said Bill of Complaint be, and the same hereby is, dismissed with costs to plaintiff.

JENNINGS BAILEY,
Justice.

9 From this Decree, plaintiff in open court hereby notes an appeal, and the said appeal is hereby allowed to the Court of Appeals and bond is hereby given at $100 or $50 cash deposited in lieu thereof.

JENNINGS BAILEY,
Justice.

Service of copy acknowledged and form of order consented to.

THOS. H. CREIGHTON, JR.,
Attorney for Plaintiff.

Memorandum.

April 2, 1935. $50 deposited in lieu of bond on appeal.

Assignment of Errors.

Filed April 2, 1935.

* * * * * * *

Now comes the Deutsche Bank and Disconto Gesellschaft, a corporation, plaintiff in the above entitled cause, by its attorneys, Thomas H. Creighton, Jr., and Adna R. Johnson, Jr., and assigns as errors in the above entitled cause the following:

(1) The Court erred in granting defendants' motion to dismiss.

(2) The Court erred in holding that Public Resolution 53, 73d Congress, is constitutional.

(3) The Court erred in holding that this Court had no jurisdiction to entertain the plaintiff's bill.

THOS. H. CREIGHTON, JR.,
ADNA R. JOHNSON, JR.,
Attorneys for Plaintiff.

10 Service of copy of the foregoing Assignment of Errors is hereby acknowledged this 2nd day of April, 1935.

HARRY LEROY JONES,
Attorney for Defendants, Homer S. Cummings, Attorney General and W. A. Julian, Treasurer of the United States.

Docket Entries.

* * * * * * *

Date.	Proceedings.	Deposits.	Fees.	Total.
1934.				
Oct. 3.	Deposit of costs by Creighton	10—		10—
" "	Bill, Appearance, Order to file, filed.			
" "	Spa. to Answer & copies (2) issued. Ret. Served 1 & 2 10-3-34.			
" 24.	Motion of deft. to dismiss bill, Ack & P&A. App. Geo. C. Sweeney, Leslie C. Garnett & Harry LeRoy Jones, filed.			
" 26.	Stipulation ext. time to Nov. 30/34 to file P & A. in opposition to dismiss bill, filed.			
Nov. 21.	Stipulation ext. time to Jan. 15, '35 to file P & A. in opposition to dismiss bill, filed.			
1935.				
Jan. 7.	Stipulation ext. time to Feb. 15, '35 to file P & A. in opposition to dismiss bill.			
Feb. 14.	P. & A. of Pltf. in opposition to motion to dismiss.			
Mch. 12.	Memorandum opinion of Bailey, J., filed.			
" 29.	Order sustaining motion to dismiss Bill, with costs; appeal noted. (Bailey, J.)			
April 2.	$50.00 deposited by Thos. H. Creighton, Jr. in lieu of bond on appeal.	50—	5—	5—
" "	Add. deposit by Thos. H. Creighton, Jr.	5—		
" "	Assignment of Errors, filed.			
" "	Designation of Record, filed.			

11 *Designation of Record.*

Filed April 2, 1935.

* * * * * * *

Now comes Deutsche Bank and Disconto Gesellschaft, a corporation, plaintiff in the above entitled cause, by its attorneys, Thomas H. Creighton, Jr., and Adna R. Johnson, Jr., and designates and directs the Clerk to print the parts of the record which they desire to have included in the transcript, said parts being considered sufficient for the determination of the question raised on appeal, namely:

(1) Bill of Complaint filed herein on October 3, 1934,
(2) Motion to Dismiss Bill of Complaint filed herein on October 24, 1934,
(3) Memorandum of Court (Bailey, J.,) filed herein on March 12, 1935,
(4) Final Decree filed herein on March 29, 1935,
(5) The Assignment of Errors,
(6) The Docket Entries, and
(7) This Designation.

THOS. H. CREIGHTON, JR.,
ADNA R. JOHNSON, JR.,
Attorneys for Plaintiff.

Service of copy of foregoing Designation of Record is hereby acknowledged this 2nd day of April, 1935.

HARRY LEROY JONES,
Attorney for Defendants, Homer S. Cummings, Attorney General, and W. A. Julian, Treasurer of the United States.

12 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 11, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 57784 in Equity, wherein Deutsche Bank und Disconto-Gesellschaft, a corporation, is

Plaintiff and Homer S. Cummings, Attorney General of the United States and W. A. Julian, as Treasurer of the United States are Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 2nd day of May, 1935.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 6471. Deutsche Bank and Disconto-Gesellschaft, a Corporation, Appellant, vs. Homer S. Cummings, Attorney General &c. et al. United States Court of Appeals for the District of Columbia. Filed May 6, 1935. Henry W. Hodges, Clerk.

FOR MR. JUSTICE VAN ORSDEL

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED SEP 14 1935

IN THE

Court of Appeals

DISTRICT OF COLUMBIA.

No. 6471

DEUTSCHE BANK UND
DISCONTO-GESELLSCHAFT,
a corporation, Berlin, Germany,
Plaintiff-Appellant,

vs.

HOMER S. CUMMINGS,
Attorney General of the United States, and

W. A. JULIAN,
as Treasurer of the United States,
Defendants-Appellees.

APPEAL FROM THE SUPREME COURT OF THE
DISTRICT OF COLUMBIA.

BRIEF FOR THE APPELLANT

THOMAS H. CREIGHTON, JR.,
ADNA R. JOHNSON, JR.,
Attorneys for Plaintiff-Appellant.

OTTO C. SOMMERICH,
THOMAS H. CREIGHTON, JR.,
JAMES J. LENIHAN,
Of Counsel.

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IN THE

Court of Appeals

OF THE

DISTRICT OF COLUMBIA.

DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT, a corporation, Berlin, Germany,

Plaintiff-Appellant,

AGAINST

HOMER S. CUMMINGS, Attorney General of the United States, and

W. A. JULIAN, as Treasurer of the United States,

Defendants-Appellees.

No. 6471

BRIEF FOR THE APPELLANT

Statement of the Case

This is an appeal by Plaintiff-Appellant from the judgment of the Supreme Court of the District of Columbia granting Defendants-Appellees' Motion to Dismiss the complaint herein.

The action is brought under the express authorization of the Trading with the Enemy Act as amended by the Settlement of War Claims Act of 1928 (45 Stat. 254), which directed that there be returned to every German eighty per cent. of its property which had been seized under the Trading

with the Enemy Act (40 Stat. 411), who filed a consent to the retention of the remaining twenty per cent. of said property.

Plaintiff-Appellant is a corporation organized and existing under the laws of Germany (R. 2) and its property was seized by the Custodian pursuant to the terms of the Trading with the Enemy Act (R. 3).

Subsequent to the passage of the Settlement of War Claims Act of 1928, Plaintiff-Appellant filed its notice of claim with said Custodian together with the consent to the retention of twenty per cent. of its property (R. 3). The return of its property was delayed owing to a warrant of attachment filed in the Supreme Court of the District of Columbia, which was dismissed by a decree of that Court, dated May 23, 1934 (R. 12). Upon said dismissal Plaintiff-Appellant demanded the return to it of eighty per cent. of its property (R. 3) but payment thereof was withheld until the enactment of Public Resolution Number 53, 73d Congress, approved June 27, 1934 (48 Stat. 1267), after which Defendants-Appellees set up said Public Resolution as an authorization for the withholding from Plaintiff-Appellant of its property ordered released under the terms of the Settlement of War Claims Act of 1928. Thereupon Plaintiff-Appellant instituted this present suit.

Defendants-Appelles subsequently moved to dismiss the complaint (R. 7). This Motion to Dismiss was based upon Public Resolution Number 53, 73d Congress, it being claimed that the return of the property of Plaintiff-Appellant, as prayed for in the Bill of Complaint, was, by virtue of said Resolution, prohibited (R. 7).

The text of the Resolution appears in the appendix hereto, but its general purport is to the

effect that because the German Government is indebted to the United States under a debt-funding agreement between Germany and the United States, dated June 23, 1930, no further returns to individual Germans shall be made under the Settlement of War Claims Act

> "whether or not a judgment or decree has been entered with respect thereto * * *"

until such time as the German Government shall have paid the amount it is in arrears under such debt-funding agreement of June 23, 1930, and

> "provided further that the President may in his sole discretion remove the restriction as to any of the cases or classes of cases * * *"

and that his determination as to Germany being in arrears

> "shall not be subject to judicial review".

It is the contention of Plaintiff-Appellant that said Resolution is not constitutional and therefore the Motion to Dismiss should have been denied.

Questions Involved

1. Whether as held by the lower court Public Resolution 53 operated as a withdrawal by Congress of the right of owners of property to sue for its recovery as provided for by Section 9 of the Trading with the Enemy Act as amended by the Settlement of War Claims Act of 1928.

2. Whether Public Resolution 53 attempts to deprive Germans who had then become alien friends of their vested right to property conferred upon

them by the Settlement of War Claims Act of 1928.

3. Whether said Resolution attempts to confiscate property in time of peace, whereas such power of confiscation exists exclusively in time of war.

4. Whether, as its title and text discloses, the Settlement of War Claims Act of 1928 operated as a final settlement of claims by both Germans and Americans by which each party made certain concessions, which created rights which cannot now be abrogated unilaterally by Congress.

5. Whether, if the enactment of the Settlement of War Claims Act of 1928 did not of itself create a vested right, did a contract creating a vested right come into existence upon the filing of a consent by a German owner to the retention of twenty per cent. of its property as provided for in said Act which cannot now be abrogated unilaterally by Congress.

6. Did Congress by vesting arbitrary discretion in the President to wholly or partially nullify the Resolution at his own will by returning property to some owners under the Act even if Germany remained in arrears and refuse to return to others, unlawfully delegate its legislative power to the President.

7. Whether Public Resolution 53 involves undue discrimination between persons of the same class, by operating against the few Germans who, prior to the passage of said Resolution, filed consents to the retention of twenty per cent. of their property and who had not received their eighty per

cent. without attempting to recall the eighty per cent. theretofore paid to the vast majority of Germans.

We are informed that up to the time of the passage of Public Resolution No. 53 there had been returned $500,000,000 worth of property and that the amount of property not yet returned does not exceed $6,000,000, and therefore the question is whether the former owners of this $6,000,000 worth of property can be deprived thereof because of the debt owing not by them but by their Government.

POINT I.

The Court erred in holding that Public Resolution 53 withdrew from the former owners the privilege of suing for the recovery of their property as provided for by Section 9 of the Trading with the Enemy Act as amended by the Settlement of War Claims Act of 1928.

The court below states (R. 18):

> "I think that Congress has full power to dispose of enemy property seized by the Alien Property Custodian, and make such changes in regard to that disposition as may from time to time seem advisable. The courts have uniformly held that a suit against the Alien Property Custodian is a suit against the United States, and have also held that Congress may grant and withdraw the privilege of bringing suit against the United States. When that privilege is withdrawn, the courts are power-

> less to act. I can see nothing unconstitutional in the withdrawal by Congress of this privilege."

It is not disputed that Congress had full power to dispose of enemy property and to make changes in regard to that disposition provided the owners had not obtained a vested right therein. But the opinion does not even intimate a holding on the vital question of the power of Congress to destroy a vested right. Had the court below been passing upon the question of the vested rights of owners, it would have plainly said that the conceded power of Congress to dispose of the property was not affected by any vested right obtained by plaintiff in the property. Instead, it holds that there is nothing unconstitutional in the withdrawal by Congress of the right to sue. Of course, generally speaking, Congress can withdraw the right to sue the United States. But, there was no withdrawal of the right to sue; on the contrary the right to sue under Section 9 of the Act as amended by the Settlement of War Claims Act of 1928 was not even remotely affected by Resolution 53.

The court below has, as did the lower courts in the case of *Lynch* v. *United States,* 292 U. S. 571, where the Supreme Court held that Congress had no power to annul a war risk insurance contract (See discussion under Point XII), confused the "right" and the "remedy". As in the *Lynch* case, so also in this case, there is involved the question of a contract and the *right* is one of contract; the *remedy* is that of bringing suit. This case is even stronger than the *Lynch* case. In the *Lynch* case it was held that the intent of Congress was to deprive the plaintiff of his rights under a war risk policy even though the repealing clause referred to

> "all laws granting or pertaining to yearly renewable term insurance",

whereas in this case there is not even a suggestion of a repeal of any law providing for suit.

The court below is incorrect in saying that Congress has full power to dispose of enemy property. It had such power, but gave it up by returning the seized property to its former owners. This is the very power which Congress reserved to itself in Section 12 of the original Trading with the Enemy Act referred to on page 16 of this brief.

The court below says:

> "* * * and make such changes in regard to that disposition as may from time to time seem advisable."

Certainly it cannot be contended that after the property had been actually delivered to the former owner thereof that Congress could enact a resolution to deprive the former owner of the property so returned.

It certainly cannot make any difference whether the property is physically returned or directed to be returned. Once title has vested in the former owner Congress can no longer authorize an act of confiscation of said property. If Congress had not in the Settlement of War Claims Act disposed of the property then Congress would have the power to change the disposition thereof, but having once vested title in the former owner it cannot make any changes in what is already a *fait accompli.*

The entire question at issue is whether by the Settlement of War Claims Act Congress did not make a disposition of that property. The question is: What was the disposition of that property? It was a disposition of Congress re-vesting title in the

former owner thereof. Having made such disposition Congress cannot hold back for the benefit of the United States, the property, ownership of which has been revested in its former owner by the Settlement of War Claims Act.

POINT II.

The purpose, intent, and policy of Congress, agreeable with the unbroken policy of the United States has always been to return enemy property to the owners thereof.

That all property seized, under the provisions of the Trading with the Enemy Act, and belonging to enemy owners, was, under the provisions of that Act, subject to the will and control of Congress, there can be no question. Such property was to "be safely held and administered" by the Alien Property Custodian, who was "vested with all of the powers of a common-law trustee in respect of all property" and "after the end of the war any claim of any enemy * * * to any * * * property received and held by the Alien Property Custodian or deposited in the United States Treasury, shall be settled as Congress shall direct" (Sec. 12, Trading with Enemy Act).

But, whatever power of disposition was enjoyed by Congress under the Act, it is a certainty that, at least prior to Public Resolution 53 of June 27, 1934, the every intent and action of Congress was to merely hold and administer the property for the owners thereof with the constant intent and purpose that the owners of the property, who were enemies when it was seized, should, when they

ceased to be enemies and in the fullness of time, receive it back with the accretions thereto.

The real intent and purpose of Congress becomes of vital importance in this case where the Government is contending, in practical effect, that on June 27, 1934, more than sixteen years after the seizure of the property and nearly sixteen years after the close of hostilities and more than thirteen years after the formal declaration of the end of the war, Congress has, in practical effect, confiscated the property and where the Government is further contending that the power of confiscation not exercised during and for many years after the war could be exercised, on June 27, 1934, on and as to property in and to which Congress had previously given the owners vested rights.

(a) The Intent and Purpose of the Executive Department was not to Confiscate Enemy Property.

On February 8th, 1917, two months before the United States entered the war, the Secretary of State issued a statement, with Presidential sanction, at a time when Germans and Austrians were beginning to withdraw their property for fear of its seizure in the event of war with their countries. This statement was as follows:

> "It having been reported to him that there is anxiety in some quarters on the part of persons residing in this country who are the subjects of foreign states lest their bank deposits or other property should be seized in the event of war between the United States and a foreign nation, *the President authorizes the statement that all such fears are entirely unfounded.* The Government of the United

> States will in no circumstances take advantage of a state of war to take possession of property to which international understandings and the recognized law of the land give it no just claim or title. *It will scrupulously respect all private rights alike of its own citizens and of the subjects of foreign states.*" (Italics ours.)

This was, therefore, a specific promise to German owners to protect them if they allowed their property to remain here.

When the act known as the "Trading with the Enemy Act" was under consideration, Hon. Robert Lansing, Secretary of State; Hon. William C. Redfield, Secretary of Commerce; Hon. Charles Warren, Assistant Attorney General, and Dr. Edward E. Pratt, chief of the Bureau of Foreign and Domestic Commerce of the Department of Commerce, under whose direction the act was drawn, appeared before the Committee on Interstate and Foreign Commerce, and on May 29, 1917, explained its object (Hearings, p. 13). Secretary Redfield, who spoke for Secretary Lansing in this matter, said in his presence:

> "The creation of an alien property custodian is a novelty and is in line with that same effort toward equity which impels us to indicate an earnest desire to show to the people with whom, unfortunately, we are engaged in war that here is the opposite of confiscation and here is the opposite of requisition."

(b) The Intent and Purpose of Congress was not to Confiscate Enemy Property even under the Trading with the Enemy Act.

1. When the Trading with the Enemy Act was originally enacted the report of the Committee on

Commerce, 65th Congress, 1st Session, Report No. 113, contained the following statement:

> "* * * Under the old rule warring nations did not respect the property rights of their enemies, but a more enlightened opinion prevails at the present time, and it is now thought to be entirely proper to use the property of enemies without confiscating it; * * *
>
> "While the theory on which the bill is drafted is that enemy property shall be protected and utilized, but not confiscated, the ultimate disposition of the enemy property received and held by the Government is left entirely to Congress, and provision is made that after the end of the war enemy claims to such property 'shall be settled as Congress shall direct'."

2. And, agreeable with the intent of Congress, as expressed by the Committee, not one word will be found in the Trading with the Enemy Act of October 6, 1917 which even suggests confiscation. On the contrary, the whole frame and substance of the Act expresses a contrary intent. The property was to be seized *and held* by a Custodian, who was to hold, administer, and account for the property until Congress should "direct" the settlement of "any claim of any enemy" to the property. Careful and elaborate provision was made for the care and custody of the property or of its equivalent. It could have been of real use to this country in financing the war and it could have been made available for such essential use by a simple act of confiscation. But, desirable and helpful as it might have been, Congress steadfastly adhered to the ideals and policies of this country not to confiscate property, but merely make it unavailable to our enemies in war against us by seizing and holding it to the end that when they ceased to be

enemies, it could and would, in accordance with American ideals, be returned to the owners thereof.

3. And the Courts have consistently held that although the power existed in Congress to confiscate enemy property, Congress, not only did not exercise the power in the Trading with the Enemy Act, but held to its purpose therein expressed not to confiscate it. So in the case of *Commissioner of Internal Revenue* v. *Stearns,* 65 F. (2d) 371, certiorari denied October 16, 1933, 54 S. Ct. 90. There the Alien Property Custodian on January 3, 1918, had seized property belonging to one Hieronymus, the taxpayer's testator who was a German citizen and who died on December 23, 1918. The property was returned to Stearns, the administrator c.t.a. of the estate of Hieronymus towards the end of 1928. The question was whether the tax "base" for the purpose of determining gain or loss in the event of sale should be fixed as of the date of the return of the property or as of the date of the death of the former owner. Had not the property been seized by the Custodian the law would have required it to be fixed as of the date of death. Stearns contended it should be fixed as of the date of the return of the property. The Circuit Court of Appeals, holding otherwise, stated as follows at page 374:

> "There remains the question of the proper time at which to fix the 'base'. Had the Alien Property Custodian not intervened, the second sentence of section 113 (a) (5), Revenue Act 1928, 26 U. S. C. A. § 2113 (a) (5), would have fixed it as of December, 1918, when the testator died. But the property was already in the Custodian's possession, seized by him nearly a year before. If the seizure had been confiscation, and the return by Congress a cession back of property of the United States,

Stearns, who as administrator was 'the decedent's estate', would have acquired nothing from the 'decedent'; the property would have come from the United States. However, the seizure was not a confiscation. True, the power to seize rested upon the constitutional power of Congress to make 'captures on land and water', clause 11, § 8, art. 1, U. S. Constitution; *Stoehr* v. *Wallace,* 255 U. S. 239, 242, 41 S. Ct. 293, 65 L. Ed. 604. But Congress was not bound to go the whole way; it might sequester without confiscating. The frame of the act did indeed leave the meaning somewhat uncertain. Apparently seizure changed 'title'; it was the substitute for the voluntary act by which the property might be 'conveyed, transferred, assigned, delivered, or paid over'. Section 7 (c), Trading with the Enemy Act, as amended by Act Nov. 4, 1918 (50 U. S. C. A. Appendix, § 7 (c). The Custodian had the powers of 'a common-law trustee', § 12, as amended by Act March 28, 1918, § 1 (50 U. S. C. A. Appendix § 12), which cannot without undue strain be supposed to go without the legal title on which such powers ordinarily depend. But even though we grant so much, *the beneficial interest need not pass, and section 12 itself shows that there was no purpose at the time that it should;* for it was enacted that all enemy claims to 'property received and held * * * shall be settled as Congress shall direct'. No doubt *the power to confiscate was held in reserve, but it was not exercised* and might never be. In fact it never was, except in small part. That this was the general intent, the reports of the two Houses amply disclose. House Reports, 83; Senate Reports, 113; 85th Congress, 1st Session. Such was the general understanding. 'Post-war International Law', John Bassett Moore, 27 Col. L. Rev. 400, 408. The contrary would have violated international usage of at least one hundred years." (Italics ours.)

In *Techt* v. *Hughes*, 229 N. Y. 222, Judge Cardozo stated at pages 244, 245:

> "The plaintiff is a resident; but even if she were a non-resident, and were within the hostile territory, the policy of the nation would not divest her of the title whether acquired before the war or later. Custody would then be assumed by the alien property custodian. The proceeds of the property, in the event of sale, would be kept within the jurisdiction. Title, however, would be unchanged, in default of the later exercise by Congress of the power of confiscation (40 Stat. ch. 106, pp. 416, 424), now seldom brought into play in the practice of enlightened nations (2 Westlake Int. L. 46, 47; *Brown* v. *U. S.*, 8 Cranch. 110)."

(c) Congress Consistently Adhered to its Policy and Purpose of not Confiscating the Property.

As is well known, Congress very early after the cessation of hostilities, began, by legislation, the direction of the return of property to former enemy owners. It provided for return of property to American wives of Germans; for the return to citizens of Czecho-Slovakia and other countries, who were, at the times of seizure citizens of Austria-Hungary and, therefore, enemies; and for the return to many others in like circumstances.

All of these Acts of Congress evidence a determined policy of Congress to deal with the property as property of those to whom it belonged when seized and not to confiscate it. But, if there were any doubt of that policy of Congress, it was certainly and effectively dispelled in 1923 when Congress enacted the Winslow Act (Act of March 4, 1923), 42 Stat. 1511, in which it directed the return of property up to $10,000.00 to each and every owner thereof, including German owners and fur-

ther provided that income up to $10,000.00 per year on property held by the Custodian should be thereafter paid to each owner thereof, including German owners. Surely the Winslow Act evidenced no intent to confiscate and surely, too, it evidenced beyond question the purpose of Congress to hold and administer the property for the owners and to ultimately return all of it and its accretions to the owners.

(d) The Contention of the Government as to the Treaty of Berlin.

The Government in its argument below strongly stressed the Treaty of Berlin (U. S. Stat. L. Vol. 42) and other matters preceding the Settlement of War Claims Act as conferring upon the United States the right of confiscation. As a matter of fact that right existed without it being conferred by a treaty and as an inherent right of the United States during the war as to seize private enemy property. All of that, however, is clearly immaterial in view of the fact that the United States, though having that power, definitely declined to exercise it when it passed the Settlement of War Claims Act.

(e) The Contention of the Government as to the Recital in Public Resolution 53 of the Joint Resolution of July 2, 1921.

Counsel for the Government in his argument below stressed the recital in the preamble of the Joint Resolution, of another Joint Resolution, which was approved July 2, 1921, known as the Knox-Porter Resolution, 41 Stat. 1359, which again provides that the seized property shall be retained by

the United States, but he failed to point out the modifying language—

> "*except as shall have been heretofore or specifically hereafter shall be provided by law.*" (Italics ours.)

It needs no argument to show that when seven years after the date of such Joint Resolution of 1921 Congress passed the Settlement of War Claims Act, that Act constituted one of the exceptions mentioned in the Joint Resolution, so that its necessary effect was that it was thereby "provided by law" that such property, to the extent to which its return was ordered, thereby should no longer be held by the United States.

POINT III.

The purpose and intent of the Settlement of War Claims Act of 1928 was to revest title in and return to the owners thereof the property and thus carry out the consistent policy of the United States in dealing with enemy property and the consistent policy of Congress in dealing with this property.

Section 12 of the original Trading with the Enemy Act provides as follows:

> "After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct: * * * ".

In compliance with this provision of the original Trading with the Enemy Act, Congress has directed

the return of the property to the former owners thereof.

In providing for the return of this property under the Settlement of War Claims Act, Congress carried out its definitive policy of non-confiscation, as its very title states, viz.: "for the ultimate return of *all* property held by the Alien Property Custodian". It is true that under Section 12 of the Trading with the Enemy Act the Alien Property Custodian was vested with the rights of a common-law trustee and could dispose of the property. The proceeds thereof, however, were to be held by the Custodian to be disposed of as Congress shall direct.

In order to carry out this policy the enactment of the Settlement of War Claims Act had for its chief aim the return of the property to its owner. This was the disposition contemplated by Section 12 of the Trading with the Enemy Act when originally enacted.

In other words, this was the method which Congress directed for the final settlement of any claim for any property seized by the Custodian. Thus, by the Settlement of War Claims Act, as its name indicates, Congress made its direction for the final disposition of the property and to the extent of 80% disclaimed any interest in the property.

That the object of Congress was to cause the immediate return of the property follows from the historical background behind the Settlement of War Claims Act, to wit, the always dominant motive of Congress to recognize the rights of the owner and avoid the stigma of confiscation.

The report of the Committee on Finance of the Senate (70th Congress, First Session, Report No. 273) reporting the Settlement of War Claims Act of 1928, throws much light on this. At pages 12-13 it is said:

"The text of the trading with the enemy act as originally enacted, the reports of the committees accompanying the bill, the discussion on the floor of both Houses of Congress, and numerous court decisions under the original act, clearly indicate that the act contemplated sequestration rather than confiscation. The amendment of March 28, 1918, however, broadened the powers of the Alien Property Custodian so as to include the right to manage or sell the property 'as though he were the absolute owner', and in the so-called *Chemical Foundation* case decided by the Supreme Court on October 11, 1926, the Supreme Court held that when any of the property was sold the former enemy owners were deprived of all rights in the property and in the proceeds derived from the sale. Though it was unnecessary for the purposes of this particular decision, the language of the court is broad enough to be open to the construction that the seizure of property under the authority of the trading with the enemy act, as amended, together with the applicable treaty provisions, deprived the owner of all rights, whether or not the property was sold, and that the property was virtually confiscated.

"It is to be noted, however, that even if the property should be held to have been confiscated (under the dictum of this decision), in spite of the clear intent of Congress to the contrary, Congress nevertheless has retained at all times absolute authority over this property and could at any time not only return it to the original owner but declare it to be held for the benefit of and for ultimate return to the original owner. This is apparently just what Congress did under the terms of the Winslow Act in providing that $10,000. of the principal shall be returned to each individual owner, and that thereafter the earnings or interest on the property remaining in the hands of the Alien Property Custodian shall be paid to the owner annually up to the sum of $10,000. So

> that notwithstanding the undoubted power of Congress to confiscate, reaffirmed in the *Chemical Foundation* case, Congress not only has refused to exercise that power up to the present time but has clearly by legislation asserted its policy to be the very contrary of confiscation."

Mr. Green, now Judge Green, when he was Chairman of the House Ways and Means Committee, at the time of the passage of the Settlement of War Claims Act, said as follows (70th Congress, 1st Session, Report No. 17):

> "The situation is an extraordinarily complex and difficult one to solve with justice to all concerned. If nothing is done—that is, if the United States retains the alien property until American claims have been satisfied and retains the ships without compensation therefor—both German and American claimants will suffer practical confiscation of their property or rightful claims, for the loss of the use of property over as long a period as 65 or 70 years is clearly not very different from complete loss in so far as this and the next generation are concerned. *Moreover, should the United States Government retain the ships without paying compensation therefor, the value of the ships must be credited to Germany on our reparation account and the fund available for the payment of American claimants will be diminished by that amount and might well be reduced by nearly one-half.* etc." (Italics ours.)

And we call particular attention to the words we have italicized in our quotation from Judge Green as indicating that if the United States had not under the Settlement of War Claims Act provided for claims of the German shipowners it would have had to credit the same amount to Germany on our reparation account. In fact it would

probably have had to credit much more than under the Settlement of War Claims Act because by that Act the claimants against the United States for ships, radios, etc. voluntarily agreed to scale their claims down in the aggregate to $100,000,000. (Section 3 (e) of the Settlement of War Claims Act), which otherwise might have been much larger. And indeed this was one of the benefits that the United States obtained through the Settlemen of War Claims Act which is now attempted to be affected by the Joint Resolution under consideration.

We further call attention to Judge Green's statement that

> " * * * the loss of the use of property over as long a period of 65 or 70 years is clearly not very different from complete loss or confiscation."

POINT IV.

By the Settlement of War Claims Act of March 10, 1928, Congress definitely, finally and conclusively carried out the policy of non-confiscation and definitely, finally, and conclusively gave to the owners of the property a right to the immediate return of eighty per cent. of their property.

(a) The Statute and Plaintiff-Appellant's Compliance therewith.

The Settlement of War Claims Act (45 Stat. 254), which is entitled—

> "An Act to provide for the settlement of certain claims of American nationals against

> Germany, Austria, and Hungary, and of nationals of Germany, Austria, and Hungary, against the United States, and for the ultimate return of all property held by the Alien Property Custodian.",

contains an amendment to Section 9 of the Trading with the Enemy Act.

Section 11 of the Settlement of War Claims Act provides that subsection (b) of Section 9 of the Trading with the Enemy Act should be amended so that subsection (b), omitting immaterial parts, shall read as follows:

> "(b) In respect of all money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, if the President shall determine that the owner thereof at the time such money or other property was required to be so conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or at the time when it was voluntarily delivered to him or was seized by him was—
>
> * * *
>
> "(13) A partnership, association, or other unincorporated body of individuals, having its principal place of business at such time within any country other than Austria, Hungary, or Austria-Hungary, or a corporation organized or incorporated within any country other than Austria, Hungary, or Austria-Hungary, and that the written consent provided for in subsection (m)* has been filed,
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> * * *

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*NOTE

Subsection (m) of Sec. 9 referred to in paragraph (13) above, is a provision of the Trading with the Enemy Act as amended by the Settlement of War Claims Act, providing as follows, omitting the immaterial parts:

> "(m) No money or other property shall be returned under paragraph (12), (13), (14), or (16) or subsection (b) or

> "Then the President, *without any application being made therefor*, may order the payment, conveyance, transfer, assignment, or delivery of such money or other property held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine such person entitled, either to the said owner or to the person by whom said property was conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian; * * *." (Italics ours.)

These provisions are followed by subsection (c) of Section 9 of the Trading with the Enemy Act as amended by the Settlement of War Claims Act, which section reads as follows:

> "(c) Any person whose money or other property the President is authorized to return under the provisions of subsection (b) hereof may file notice of claim for the return of such money or other property, as provided in subsection (a) hereof, and thereafter may make application to the President for allowance of such claim and/or may institute suit in equity to recover such money or other property, as provided in said subsection, and with like effect. * * *"

Therefore subsection (c) authorizes former enemy owners to proceed under subsection (a) of Section 9 of the Trading with the Enemy Act, which theretofore had been confined to non-enemy claimants.

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under subsection (g) or (n) or (to the extent therein provided) under subsection (p), unless the person entitled thereto files a written consent to a postponement of the return of an amount equal to 20 per centum of the aggregate value of such money or other property (at the time, as nearly as may be, of the return) as determined by the Alien Property Custodian, and the investment of such amount in accordance with the provisions of section 25."

Section 25 provides for the investment out of the funds held by the Alien Property Custodian by the Treasurer of the United States in one or more participating certificates issued by the Secretary of the Treasury in accordance with the provisions of that section.

Subsection (a) of Section 9, omitting the immaterial parts, provides:

> "That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder * * * may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, * * *. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required * * * said claimant may institute a suit in equity in the Supreme Court of the District of Columbia * * * to establish the interest, right, title * * * so claimed, and if so established *the court shall order the payment,* conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest * * *". (Italics ours.)

In other words we have a direction for the immediate return of the property, seized by the Custodian, to its German owners, providing they consent to the postponement of the return of an amount equal to 20% of the property.

In this case, in paragraph 9 of the complaint (R. 3) it is alleged that the plaintiff-appellant has filed a notice of claim containing such particulars as required by law, which means that the plaintiff-appellant has filed a consent under subsection (m)

of Section 9 of the Trading with the Enemy Act to the postponement of the return of an amount equal to 20% of the value of the property seized.

In view of the statutory direction that the Court "shall" order the payment, if the President does not, it is perhaps unnecessary to contend that the word "may", which is to be found in the concluding paragraph of Section b stating that the "President, without any application being made therefor, *may* order the payment, * * *", or in subsection (a) stating that "the President, if application is made therefor by the claimant, *may* order the payment, * * *", must be regarded as mandatory* because if the President does not return the property the Supreme Court of the District of Columbia is required to direct the return of the property for it is stated in subsection (a) that the "*court shall order the payment*" to the claimant.

In other words, the *Court* is directed by this legislation to return the property if the President does not return it through the Custodian administratively. Thus the former enemy owner is entitled to receive from the court, when his action is brought, a direction for the immediate return of his property provided he files the consent to the postponement of the return of the 20%.

It follows from the above that the plaintiff-appellant herein was, on March 10, 1928, entitled to the return of the property formerly belonging to it and seized by the United States Government.

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*NOTE

It has been frequently held that the word "may" must be interpreted as meaning "shall" or "must" if it appears that the public interest or individual rights require that it should be. (*Supervisors* v. *United States*, 4 Wall. 435; *Fidelity & Casualty Co. of New York* v. *Brightman*, 53 F (2d) 161, 167; *Michaelson* v. *United States*, 266 U. S. 42, 45 S. Ct. 18.)

The whole act was a provision giving claimant owners the *legal right* to the return of their property, on consenting to the temporary withholding of 20%. Payment by the Custodian was not discretionary, but mandatory.

Being entitled to such immediate return the question arises—How can Congress, having directed such immediate return, 95% having already been returned, deprive the plaintiff-appellant, part owner of the remaining 5%, of that which it has thus recognized as plaintiff-appellant's property? (See Reports of Alien Property Custodian, H.R. Doc. 543, 1930 and H.R. Doc. 133, 1933.)

After March 10, 1928 the Alien Property Custodian no longer held the property, for the return of which this suit is brought, for the United States but for the exclusive benefit of the plaintiff-appellant. The capacity of the Alien Property Custodian was definitely changed by the Settlement of War Claims Act of 1928.

Upon the enactment of the Settlement of War Claims Act the owners of the property seized were given the right to the immediate possession of their property upon submitting proper proof of ownership and consent to the temporary withholding of 20% thereof. From their property the Alien Property Custodian was authorized to withhold only 20% (temporarily), taxes and the amount of "necessary expenses".

In the complaint it is alleged (Par. 10, R. 3) that prior to the commencement of the action the Alien Property Custodian determined that the plaintiff-appellant herein was the owner of said property and entitled to the return of said property as provided by the Trading with the Enemy Act as amended by the Settlement of War Claims Act.

It is clear, therefore, that plaintiff-appellant, having complied with all the provisions of the Act, was, under the Act, entitled to the immediate return of eighty per cent. of its property.

(b) The various provisions of the Settlement of War Claims Act indicate that the United States Government intended to part with every and all interest in the seized property except the 20% "temporarily" withheld and the amount reserved for expenses.

Numerous provisions of the Trading with the Enemy Act as amended by the Settlement of War Claims Act, indicate that Congress intended to surrender all of the rights of the United States Government in and to the property seized.

Thus by Section 25 (e), added to the Trading with the Enemy Act by Section 10 of the Settlement of War Claims Act, the Secretary of the Treasury was directed to issue to the Custodian 5% interest bearing certificates representing such 20% deductions, and also non-interest bearing certificates representing the claimants' interest in the so-called unallocated interest fund, which included accumulated interest derived prior to March 4, 1923 from invested cash of former enemies, the repayment of which was postponed. (See Sec. 28 of the Settlement of War Claims Act.)

Section 25 (e) subdivision (2) contains the following provisions with regard to these participating certificates:

> "(2) Such certificates shall not be transferrable, except that the Alien Property Custodian may transfer any such participating certificate evidencing the interest of a substantial number of the *owners* of the money invested, to a trustee duly appointed by such *owners*."

The evident purpose of this provision was that the owners could obtain from some bank or

bankers, or other persons, advances upon the security of these certificates. This is the strongest evidence that Congress intended to divest the United States Government completely of any interest in the property, not only that returnable outright, but even that "temporarily" withheld. It must be remembered that the fund of some $35,000,000 representing the 20% "temporarily" withheld from its recognized owners, was paid into the Special Deposit Account for distribution to the American claimants, so that this money was not actually retained by the United States. The expression "temporarily" withheld appears also in Section 25.

Section 25 (a) subdivision (2) contains the following sentence:

> "(2) When in the case of any trust written consent under subsection (m) of section 9 has been filed, an amount equal to the portion of such trust the return of which is temporarily postponed under such subsection shall be credited against the investment made under paragraph (1) of this subsection."

Thus, the retention of 20% was only a "temporary" matter, whereas the balance of 80% was to be returned immediately.

By Section 9 (m), added to the Trading with the Enemy Act by Section 14 of the Settlement of War Claims Act, it is provided that claimants of designated classes before receiving their property must "consent to a postponement of the return of an amount equal to 20 per centum of the aggregate value thereof". Therefore the "amounts so deducted shall be returned to the persons *entitled thereto* as provided in subsection (f) of section 25."

By Section 30, added to the Trading with the Enemy Act by Section 15 of the Settlement of

War Claims Act, it is provided that any property returnable under subsection (b) or (n) of section 9 of the Trading with the Enemy Act, which includes property of former enemy owners, shall be subject to attachment on suits brought against the owners.

If, therefore, the 80 per cent. was attachable by third parties, there can be no doubt that it was property *vested* in the Germans. For, if the United States had reserved even the faintest rights thereto, it could not have been attached as property of the Germans.

By Section 24 (b), added to the Trading with the Enemy Act by Section 18 of the Settlement of War Claims Act, it is provided that income, war-profits, excess-profits, or estate taxes imposed by any Act of Congress, shall be computed as if the property had not been seized by the Custodian but had been held at all times by the alien owners themselves.

These provisions are a clear demonstration that Congress recognized the rights of the aliens as owners of the property, and that they were to be vested, upon the passage of the Act, with complete owners' interest in the property returned.

(c) The reservation of the right to tax expenses, far from indicating that Congress intended to withhold the immediate beneficial title from the former alien enemy owners, is definite proof that, except as to such expenses, Congress relinquished all dominion as to the 80%.

Section 24 of the Trading with the Enemy Act authorized the Custodian to pay the expenses incurred in obtaining and administering the property taken and held by him, and required payments

to be made out of the property in respect to which expenses were incurred. The Act of May 16, 1928 (45 Stat. 574), directed that all expenses of the Custodian's office, including his compensation, "should be paid from interest and collections of trust funds and other property under his control." Under the Act of March 4, 1923 (Winslow Resolution) there was released to each of the German owners $10,000 of principal, and income not exceeding $10,000 annually thereafter, less 1% of the amounts paid out between March 4, 1923 and November 1, 1927, and 2% of those paid after the date last mentioned.

In the Independent Offices Appropriation Act for 1935, passed March 28, 1934 (Public No. 141, 73rd Congress, 2nd Session), there was a provision that—

> "No claim shall be filed * * * nor shall any suit be instituted or maintained against the Alien Property Custodian or the Treasurer of the United States, or the United States, under any provisions of law by any person who was an enemy or ally of enemy as defined in the Trading with the Enemy Act, as amended * * * nor judgment entered in any such suit heretofore or hereafter instituted, for the recovery of any deduction or deductions heretofore or hereafter made by the Alien Property Custodian from money or properties, or income therefrom, held by him or by the Treasurer of the United States hereunder, for the general or administrative expenses of the office of the Alien Property Custodian."

In other words, the history of the legislation, set forth under this Point, indicates that Congress undertook merely to appropriate from the property seized, so far as might be necessary, the amount of the expenses incurred in the administration of the property by its trustee, the Custodian.

Thus, Congress has made three reservations as to the 80% returned; First, there must be a consent as to the temporary retention of 20%; second, the reservation as to taxes; and third, the reservation as to expenses of administration.

The enumeration of these specific reservations shows that thereby Congress intended to exhaust and did exhaust the reasons for which it undertook to continue any dominion whatever over the property, and emphasizes the definite relinquishment of any other claim to the property.

In the case of *Woodson* v. *Deutsche G. und S. Scheideanstalt,* 292 U. S. 449, 54 S. Ct. 804, the United States Supreme Court recognized that Congress intended to make these reservations for the payment of expenses, because there had been an express reservation in the original Trading with the Enemy Act, and in the Act of March 4, 1923 and the Act of May 16, 1928, and therefore held that as to the 2% retained for the expenses there was no vested right infringed. On this subject the Supreme Court of the United States said as follows (pp. 805, 806):

> "The original act, coupled with the later Acts of March 4, 1923, and May 16, 1928, plainly discloses a reservation to Congress of power to appropriate the property seized or its proceeds, *as far as might be deemed necessary, to the payment of expenses incurred in the seizure and subsequent administration.* The funds here in question are proceeds which were deducted for that purpose *when payments were made from time to time to the enemy owner.* As respects property or proceeds so retained by the Custodian there is no room to doubt that Congress had full power to cause it to be applied to the payment of such expenses. And, of course, Congress had ample power to ratify deductions made by the Custodian to cover such expenses. This is in effect what was

> done by the Act of March 28, 1934. True, it forbade the commencement or maintenance of a suit to recover funds so deducted, but this merely reflects and emphasizes the purpose to sanction and ratify the deductions by the Custodian, and *in such circumstances* does not deprive the respondent of any *vested* interest." (Italics ours.)

The necessary inference, from the fact that the Supreme Court of the United States held that because of the original reservation in the Trading with the Enemy Act, and in the Acts of March 4, 1923 and May 16, 1928 there had been these reservations, is that the owners were entitled to the return of the balance of the property not thus reserved for expenses, and, therefore, as to the balance these owners must have a vested interest.

It is only with respect to the reservations made by Congress that the Supreme Court held there was no vested interest. As to the balance the Supreme Court opinion implies that the owners have a vested interest. This confirms the conclusion which the legislative history of the transaction amply demonstrates.

POINT V.

The Settlement of War Claims Act having vested in the former owners an immediate right to the return of their property pursuant to recognized international law, which does not permit confiscation, the recognition of these rights was not a mere act of grace but the performance of a legal and moral duty.

We have in the previous Points indicated that it was the intention of Congress that the German

owners should obtain the immediate return of their property, subject only to the deductions for expenses, taxes and the 20% "temporarily" withheld.

The Government now contends that this return was an act of grace similar to the grant of bonuses and pensions.

Such contention was definitely held to be erroneous in *Commissioner* v. *Stearns,* 65 Fed. (2d) 371 (pp. 12, 13, *supra*), where the Court held that a seizure was *not* "confiscation and the return by Congress a cession back of property of the United States".

This contention of the Government, moreover leaves out of sight the fact that the basis of the return of this property is Congressional recognition of an absolute legal and moral right based upon international law.

We shall submit upon the argument of this appeal Senate Document No. 181, 69th Congress, 2nd Session, entitled "American Policy Relative to Alien Enemy Property" written by Warren F. Martin, former Special Assistant to the Attorney General, and J. Reuben Clark, Jr., former Solicitor of the State Department, and presented by former Senator Reed of Pennsylvania. This pamphlet establishes that under International Law, as recognized by the United States throughout its history, the return of property sequestrated is an absolute duty of the Government in the carrying out of a moral obligation recognized by all nations prior to the World War. This pamphlet is so complete that we shall not presume to repeat its contents.

Our greatest authority on International Law, John Bassett Moore, in his Digest of International Law (Vol. VII, 312-313), stated, in discussing

Chief Justice Marshall's professed distinction between a right and the exercise of a right:

> "Referring to the practice of nations and the writings of publicists, he declared that, according to 'the modern rule, tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated'; that 'this rule' seemed to be 'totally incompatible with the idea that war does of itself vest the property in the belligerent government'; and consequently, that the declaration of war did not authorize the confiscation. Since effect was thus given to the modern usage of nations, it was unnecessary to declare, as he did in the course of his opinion, that 'war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found,' and that the 'mitigation of this rigid rule which the humane and wise policy of modern times has introduced into practice' though they 'will more or less affect the exercise of this right,' 'can not impair the right itself.' Nor were the two declarations quite consistent. *The supposition that usage may render unlawful the exercise of a right, but can not impair the right itself, is at variance with sound theory.* Between the effect of usage on rights, and on the exercise of rights, the law draws no precise distinction. A right derived from custom acquires no immutability or immunity from the fact that the practices out of which it grew were ancient and barbarous. We may, therefore, ascribe the dictum in question to the influence of preconceptions, and turn for the true theory of the law to an opinion of the same great judge, delivered twenty years later, in which *he denied the right of the conqueror to confiscate private property*, on the ground that it would violate 'the modern usage of nations *which has become law.*' (*United States* v. *Percheman*, 7 Peters, 51.)" (Italics ours.)

Furthermore, we have indicated that all this property remained here, after President Wilson, on February 8, 1917, promised that it would not be confiscated. We have before us in the Settlement of War Claims Act, legislation carrying out this promise made by President Wilson. Therefore, the return of the property is not a mere act of grace but the carrying out of a solemn promise made pursuant to international law and United States policy.

If the return of the property is not a mere act of grace, then the return of such property must be regarded as vesting in the owner an immediate right of enjoyment.

That the satisfaction of a claim, having its foundation in international law, is not a mere act of grace, was indicated in the case of *Williams* v. *Heard,* 140 U. S. 529, 11 S. Ct. 885. In that case the Supreme Court of the United States held that the Act of Congress of June 5, 1882, providing for the distribution of the unappropriated moneys from the Geneva award for the payment of claims caused by the infraction of international law by the English Government due to the Alabama incident, and directing the examination of the claims and the payment of premiums for war risks, was not a mere donation but the effectuation of the payment of claims which existed before the passage of the Act of Congress.

In that case the Court held that the right to receive this payment provided for by Congress was a vested property right passing to the estate in bankruptcy of the claimant.

The Supreme Court, adopting the ruling in the cases of *Comegys* v. *Vasse,* 1 Peters. 193, and *Phelps* v. *McDonald,* 99 U. S. 298, and adopting the language of Mr. Justice Swayne in the case of *Comegys* v. *Vasse, supra,* said:

> "'There is no element of a donation in the payment ultimately made in such cases. Nations no more than individuals make gifts of money to foreign strangers. Nor is it material that the claim cannot be enforced by a suit under municipal law which authorizes such a proceeding. In most instances the payment of the simplest debt of the sovereign depends wholly upon his will and pleasure. The theory of the rule is that the government is always ready and willing to pay promptly whatever is due to the creditor. * * * It is enough that the right exists when the transfer is made, no matter how remote or uncertain the time of payment. The latter does not affect the former. * * * If the thing be assigned, the right to collect the proceeds adheres to it, and travels with it withersoever the property may go. They are inseparable. Vested rights *ad rem* and *in re*—possibilities coupled with an interest on claims growing out of property—pass to the assignee.' 99 U. S. 303, 304. To the same effect are *Ervin* v. *U. S.*, 97 U. S. 392; *Bachman* v. *Lawson*, 109 U. S. 659, 3 Sup. Ct. Rep. 479."

Thus, it may be regarded as firmly established that the payment of these claims, and similarly the return of the property herein, cannot be regarded just as a mere act of grace of a sovereign.

The property of the German owners remained here by reason of the promise of the sovereign, and under the circumstances, the fulfillment of the promise not to confiscate but to return it must be regarded not as an act of grace but the performance of a clear moral duty. When this promise is carried out it cannot be regarded as a promise with, so to speak, strings attached to it. Consequently, the Act of Congress, embodied in the Settlement of War Claims Act, must be regarded as creating a vested right.

The recognition of a moral duty has from time immemorial been regarded as sufficient consideration for a promise based upon such moral duty without further payment of consideration.

Thus, a debt that has been discharged in bankruptcy, when afterwards recognized by a written promise to pay, becomes a new obligation without further consideration. The United States Supreme Court in *Zavelo* v. *Reeves*, 227 U. S. 625, 33 S. Ct. 365, said at page 367:

> "It is settled, however, that a discharge, while releasing the bankrupt from legal liability to pay a debt that was provable in the bankruptcy, leaves him under a moral obligation that is sufficient to support a new promise to pay the debt."

POINT VI.

The Settlement of War Claims Act was the result of an agreement between the German owners, the American claimants, and the United States and the right of plaintiff-appellant in and to this property is a vested right immune to unilateral impairment.

The Settlement of War Claims Act was passed pursuant to a compromise by which the American claimants and German owners each gave up temporarily a part of their rights. The Treasury had, since 1925, insisted that the institution of private property and the protection of American private property abroad, not to speak of the definite commitments of the United States, made it essential that the sequestrated private property be returned in full to its owners.

(See Document No. 191, 69th Congress, 2nd Session.)

An Administration bill to this effect was introduced in 1926. The American claimants against Germany, however, felt that if the property were returned in full there would be insufficient funds with which to pay any considerable percentage of their claims. They therefore opposed immediate return in full, and advocated a compromise. The American claimants agreed among themselves that the owners of claims under $100,000 should be paid in full, whereas the balance of the large claimants would accept $100,000 plus a sum sufficient to make up 80% of their awards. For the balance, drawing interest at 5%, the American claimants were willing to wait.

Mr. Sidley, speaking for the American claimants, testified before the Senate Committee. See Hearings before the Committee on Finance, United States Senate, 70th Congress, 1st Session (H.R. 7201) as follows (p. 22):

> "I am here to explain why it is that we would not want to go in and ask for a larger award for the German property. There has been a suggestion of 40 per cent instead of 20 per cent. Some people have asked why we do not come in and insist that there be 40 instead of 20, because obviously we would be benefited by it. Our answer to that is that under the insistence of the committee of the House and in view generally of the situation which existed, it became necessary for us to enter into an understanding with the German interests in order to get some kind of a bill through. The vital thing to us is to get a bill. The most unhappy thing would be a deferment of the bill beyond this session. It was said to us by the Committee on Ways and Means that, 'You and these Germans try to get together on some com-

promise and see if you can not get a basis upon which we can act,' and it was suggested by Mr. Green at the time that, 'Possibly if you could get 75 per cent of your claims now and the Germans 75 per cent of the property, and defer the balance, that might be a basis.'

"Consequently, we had a meeting of our committee and conferred with our people as far as we could and concluded that we could make some substantial concessions in order to get some kind of a bill through. We met the Germans, Doctor Kiesselbach and Doctor von Lewinsky, and they assured us they did represent substantially all of the interests which had to do with the alien property fund and that they also spoke for the shipowners, and they were prepared to make very substantial concessions; not what we would like—the bill is not what we wanted to begin with—but they offered this 20 per cent retention of the alien-property fund. They offered to throw in all of the unallocated interest. They offered this 50 per cent of the ship money, which looked like a considerable concession, and we concluded upon that basis we would report to Mr. Green that we would support the bill on that basis."

This is the agreement which is spoken of in the Senate Report, 70th Congress, 1st Session (No. 273)—pages 2-4:

"(3) The United States Government, under the authority of a joint resolution of Congress, seized and took title to a large number of ships owned by citizens of Germany, and acquired for its own use during the war a large number of patents and a radio station. The United States is justly indebted to the German nationals for the value of their property, for there was no thought at the time, and certainly no serious consideration has been given subsequently to the possibility, of the confiscation of private property not of a naval or military

character. Consequently, some provision must be made for the payment of the amounts justly due.

"The proposed legislation recognizes the close relationship between the problems and that they must be solved together. In theory, the solution might be simple. However, we are confronted with a practical situation, and a practical solution, therefore, must be provided. Under the circumstances, it is impossible to provide for the immediate payment of all the American claimants, the immediate payment of all the owners of the ships and patents and the radio station, and the immediate return of all the alien property. Accordingly, your committee was confronted with the task of providing for the *immediate payment of* as large a percentage as possible of the claims of the American nationals and German nationals, and for the return of as large a percentage as possible of the alien property.

* * * * * * *

"Under the terms of the bill an amount equal to 80 per cent of the aggregate of the awards entered by the Mixed Claims Commission, entered on account of claims of nationals of the United States, is to be used immediately for the payment of all death and personal injury claims awards and all awards of $100,000 or less. The balance is to be prorated among the larger awards. The above percentage was reached by an agreement between the representatives of the American claimants affected and of the German alien property owners. The representatives of the American claimants appeared before your Committee and testified that the percentage was very satisfactory and that they preferred that the provisions of the bill be in accordance with the agreement. Consequently, your Committee is recommending no change." (Italics ours.)

The name "Settlement of War Claims Act of 1928" indicates that this agreement was to be a

settlement of these various conflicting claims. It was a final disposition of a matter which had been pending in Congress for ten years. Consequently, this distribution of the property, and of the appropriations made by Congress, vested in these various claimants rights which could not be divested by the unilateral action of Congress.

These were vested rights, the result of a compromise in pursuance of a policy of non-confiscation which Congress adopted and followed ever since the passage of the Trading with the Enemy Act.

This was not only a final contractual settlement of the respective claims of all three parties to the agreement concluded under the aegis of the United States Treasury, but its execution by all three parties, speaking now through the United States Government which alone had control of the funds, was an obligation from which no party to the agreement could unilaterally withdraw without obloquy. Such an agreement as this, in which the United States Government undertakes to bring the parties together and cooperates in effecting a compromise of their claims by which they receive part of what is legally due them in consideration of a temporary postponement of the balance, is a contract to which the United States is also a party, and may very properly be deemed a contract and a conclusive grant of a property right within the protection of the Fifth Amendment. It would be extraordinary if, after negotiations over a long period of years, a final settlement of conflicting claims is reached and vested rights subject to pledge and lien are thereby created, that one of the parties or the United States could then withdraw from the settlement in its discretion and take away the rights respectively conferred and confirmed by the settlement.

It is clear, therefore, that the purpose of the Settlement of War Claims Act was to revest complete

title in the former owner, and to confer on him an unimpairable right to its return, as soon as he made the necessary application therefor.

POINT VII.

The Settlement of War Claims Act conferred upon plaintiff-appellant the statutory right to the immediate return of eighty per cent. of its property and plaintiff-appellant, having consented to the acceptance of eighty per cent. thereof and to the retention of twenty per cent. thereof, obtained a vested right therein of which it cannot constitutionally be deprived by Public Resolution 53 of June 27, 1934.

We have hereinbefore (Point IV) pointed out that Section 12 of the Trading with the Enemy Act specifically provided that "after the end of the war any claim of any enemy" to the property "shall be settled as Congress shall direct"; that "after the end of the war", by the Settlement of War Claims Act of March 10, 1928, Congress provided "for the ultimate return of all property held by the Alien Property Custodian"; that the Act provided for the immediate payment of eighty per cent. of the property and the "temporary" postponement of the payment of the remaining twenty per cent. thereof.

We also pointed out (Point IV) and here emphasize that this claimant is of the class described in subsection 13 of Section 11 of the Settlement of War Claims Act and that as such claimant it could not obtain the return of eighty per cent. of its

property unless it filed "a written consent to a postponement of the return of an amount equal to twenty per centum of the aggregate value of such money or other property (at the time, as nearly as may be, of the return) as determined by the Alien Property Custodian, and the investment of such amount in accordance with the provisions of Section 25", as provided in subsection (m) of Section 14 of the Act. We also pointed out herein and alleged in the Bill of Complaint, the fact, which has not been and cannot be denied that plaintiff-appellant had complied with all the provisions of the Act, including the filing of such consent, long prior to the passage of Public Resolution 53 of June 27, 1934.

By the Act, Congress "directed" the return of eighty per cent. of its property to plaintiff-appellant and gave it the full and complete statutory right to such return. Pursuant to that statutory right, plaintiff-appellant acted and performed every act, including that of filing a consent to the postponement of the payment of twenty per cent. of its property and of agreeing to accept but eighty per cent. thereof. *We submit that in such circumstances, the right of plaintiff-appellant to the return of eighty per cent. of the property was fixed by the law in force when it filed its consent to the postponement of the payment of twenty per cent. of its property and to the use of such twenty per cent. by the United States for the purposes set forth in the Act and the right so vested cannot be defeated by Public Resolution 53 of June 27, 1934.*

When consideration is given to the fact that Congress at no time evidenced any purpose or intent, as to the ultimate disposition of the property other than to return it to its owners and that it always and consistently treated the property as belonging

to the original owners thereof and that the purpose, intent, and action of Congress was, by the Settlement of War Claims Act, to immediately return 80 per cent. of the property to such owners, we think it follows that Congress, by such Act, absolutely surrendered all dominion and control over the same and could not by the subsequent Resolution again assume dominion and control over it.

But, assuming, arguendo, that such is not the law, *there certainly is no possible escape from the proposition that, when the statutory right was given and the parties had acted in compliance with and under authority of the statute, then and in that event plaintiff-appellant enjoyed a vested right which could not be defeated by the Resolution.*

In the case of *Steamship Company* v. *Joliffe*, 2 Wall. 450, according to a California statute, where a pilot licensed under statute had tendered his services to a vessel out of port and such services were refused, such pilot was entitled to half-pilotage fees allowed by statute in such cases. After tendering these services the statute was repealed, and it was claimed that by reason of this repeal the pilot was not entitled to recover the half-pilotage fees, but Mr. Justice Field, writing the opinion of the United States Supreme Court, said (pp. 457, 458):

> "* * * When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

Certainly, there was and could have been no enforceable claim for mere tendered services, in the

absence of statute, but under the statute a right to fees for such services was created. So also in this case, if it can be said that plaintiff-appellant had no enforceable claim for a return of the property prior to the Settlement Act, it certainly was given the right to the return of 80% thereof under the Act. In the *Joliffe* case, the pilot had tendered his services for which tender he became entitled, under the statute, to the fees. So also in this case, plaintiff-appellant filed its claim and consented to the retention of 20% of the property and the use thereof by the United States, for which consent he became entitled, under the statute, to the immediate return of 80% of the property. In the *Joliffe* case, the Court held that by the tender of the services a right arose upon a contract and that that right was a vested right which could not be defeated by the repeal of the statute which provided for the fees. So also in this case, by giving the consent, a right arose upon a contract and that right is a vested right which cannot be defeated by Public Resolution 53.

In the case of *Ettor* v. *Tacoma,* 228 U. S. 148, the State of Washington had, by legislation, given to abutting owners compensation for consequential damages growing out of an original street grading made under municipal direction. After the plaintiffs' damage had occurred a law was passed repealing such legislation. The Supreme Court said:

> "The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act,—a right which was in every sense a property right. Nothing remained to be done to complete the

> plaintiffs' right to compensation except the ascertainment of the amount of damages to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested can not be defeated by subsequent legislation. *Elgin* v. *Eaton,* 83 Ill. 535; *Healy* v. *New Haven,* 49 Conn. 394; *Harrington* v. *Berkshire,* 22 Pick. 263; *People ex rel. Fountain* v. *Westchester County,* 4 Barb. 64, are cases arising under street or highway statutes. The principle has been applied in reference to rights accruing under a variety of statutes when affected by a subsequent change of the law. *Pacific Mail S.S. Co.* v. *Joliffe,* 2 Wall. 450; *Miller* v. *Union Mill Co.,* 45 Wash. 199; *Grey* v. *Mobile Trade Co.,* 55 Ala. 388; *Stephens* v. *Marshall,* 3 Pinney (Wis.) 203; *Gorman* v. *McArdle,* 67 Hun. 484, 22 N. Y. Supp. 479; *Westervelt* v. *Gregg,* 12 N. Y. 202; *Creighton* v. *Pragg,* 21 Cal. 115; *State Trust Co.* v. *Kansas City P. & G. H. Co.,* 115 Fed. 367."

The Court very clearly pointed out that the damages which Ettor had suffered were "consequential damages" and that, in the absence of the statute, there was no liability for such damages (p. 150), but the Court also pointed out that the statute created the liability for such damages (p. 151). So also in this case, if it can be said that prior to the Settlement Act plaintiff-appellant was not entitled to the return of the property, it was given the right to such return by the Settlement Act. In the *Ettor* case, the Court pointed out that the damage had been done and nothing remained to be done except the ascertainment of the amount of such damage. So also in this case, plaintiff-appellant complied with all the provisions of the statute, including that of giving the consent, and nothing remained to be done except the delivery of 80% of the property

to it. In the *Ettor* case, the Court held that the right of Ettor to his damages was fixed by the law in force when his property was damaged and that such right was then a vested right which could not be defeated by subsequent legislation. So also in this case, the right of plaintiff-appellant to the return of 80% of the property was fixed by the law in force when it consented to the postponement of the return of 20% thereof and the use of the same by the United States and such right was then a vested right which could not be defeated by the "subsequent legislation" to wit, Public Resolution 53.

In *Coombes* v. *Getz*, 285 U. S. 434, the following facts appeared: The California constitution contained a section providing that directors of corporations should be liable to creditors for all moneys embezzled or misappropriated by corporate officers. Another section reserved in the legislature the power to alter or repeal any future laws concerning corporations. Plaintiffs, who had contracted with the corporation while these provisions were in force, brought suit to enforce the constitutional liability against the defendant, a director of the corporation, for money misappropriated by officers of the corporation. While this action was pending, the legislature repealed the section making the directors liable. This Court held that the statute repealing this section was unconstitutional as to the plaintiffs, on the ground that it contravened both the contract impairment clause and the due process clause of the United States Constitution. The opinion in that case delivered by Mr. Justice Sutherland, contained the following language (p. 442):

> "The right of this petitioner to enforce respondent's liability had become fully perfected

> and vested prior to the repeal of the liability provision. His cause of action was not *purely* statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which in every sense was a property right, *Ettor* v. *Tacoma,* 228 U. S. 148, 156; *Pritchard* v. *Norton,* 106 U. S. 124, 132) to enforce his cause of action upon the contract. *Ettor* v. *Tacoma, supra; Hawthorne* v. *Calef,* 2 Wall. 10; *Steamship Co.* v. *Joliffe,* 2 Wall. 450; *Ochiltree* v. *Railroad Co.,* 21 Wall. 249, 252-253; *Harrison* v. *Remington Paper Co.,* 140 Fed. 385, 390, *et seq.; Knickerbocker Trust Co.* v. *Myers,* 133 Fed. 764, 767."

and at page 448:

> "It is settled by decisions of this and other federal courts (*Ettor* v. *Tacoma,* and cases cited in connection therewith, *supra*) that, upon the facts here disclosed, a contractual obligation arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in Art. 1, § 10, and the due process of law clause in the Fourteenth Amendment of the Federal Constitution."

Obviously, there was, in the absence of the constitutional provision, no liability of the director for the derelictions of the officer, but the constitution created such liability. So also in this case, if it can be said that there was no liability of the defendants prior to the Settlement Act for the return of the property, that Act created such liability. In

the *Coombes* case, the Court held that the defendant therein was a director when the defalcation occurred and that the right of plaintiff existed under the constitution at that time and that the right was a vested right coming within the protection of the contract impairment clause of the Constitution. So also in this case, the right of plaintiff-appellant to the return of 80% of the property existed under the Settlement Act when it filed its consent, pursuant to said Act, to the postponement of the payment of 20% thereof and the use thereof by the United States, and its right is a vested right coming within the protection of the due process clause of the Constitution.

In the case of *State Trust Co.* v. *Kansas City, P. & G. H. Co.*, 115 Fed. 367, 372, it appeared that interveners' property was injured by fire caused by the Railroad Company which was in the hands of receivers. Under a statute existing at the time of plaintiff's loss they were given a preferred lien. After the loss had occurred, the statute giving this preferred lien was repealed. With regard to the repeal of this act the Court said as follows:

> "The act of March 19, 1887, was in full force and effect when the interveners sustained the loss on which their intervention is based. They, therefore, had acquired a vested right under the statute of March 19, 1887, and the legislature was without power to divest it."

In Sutherland Statutory Construction, Vol. 2 (2nd Ed.) page 1217, the author said:

> "Vested rights cannot be destroyed, divested or impaired by direct legislation. Their protection is one of the primary purposes of government. They are secured by the bill of rights and the constitutional limitations upon the exercise of the sovereign powers."

A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference, and whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away.

Prichard v. *Norton,* 106 U. S. 124;
Johnson v. *Jones,* 44 Ill. 142.

A statute impairs the obligation of a contract if it prevents its enforcement, or tends to postpone or retard enforcement, or seriously interferes with the enforcement of the contract.

McGahey v. *Virginia,* 135 U. S. 662;
Louisiana v. *New Orleans,* 102 U. S. 203;
Seibert v. *Lewis,* 122 U. S. 284;
South Carolina v. *Gaillard,* 101 U. S. 437.

In the case of *People* v. *Hawkins,* 157 N. Y. 1 (51 N. E. 257) the Court said as follows (p. 7):

> "The citizen cannot be deprived of his property without due process of law. The principle embodied in this constitutional guaranty is not limited to the physical taking of property. Any law which annihilates its value, restricts its use, or takes away any of its essential attributes, comes within the purview of this limitation upon legislative power. The validity of all such laws is to be tested by the purpose of their enactment and the practical effect and operation that they may have upon property. A law which interferes with property by depriving the owner of the profitable and free use of it, or hampers him in the application of it for the purposes of trade or commerce, or imposes conditions upon the right to hold or sell it, may seriously impair its value, against which the Constitution is a protection."

Thus the Supreme Court of the United States has held that where a vested right is created by statute that vested right cannot be taken away by subsequent legislation.

We submit that when, by the Settlement of War Claims Act, plaintiff-appellant was given the right to the return of 80% of its property upon the filing of its consent to the postponement of the payment of 20% thereof and the use of such 20% by the United States, and when plaintiff-appellant gave and filed such consent, the right of plaintiff-appellant to the return of 80% of its property became a vested right which, as the Supreme Court and the authorities have clearly held, cannot and was not defeated by the subsequent legislation of June 27, 1934.

POINT VIII.

Public Resolution 53, involving complete delegation of legislative powers by Congress to the President, falls directly within the condemnation in the cases of *Panama Refining Co.* v. *Ryan*, 293 U. S. 382, 55 S. Ct. 241, and *Schechter* v. *United States*, 55 S. Ct. 837.

In the case of *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 55 S. Ct. 241, Justice Hughes said (p. 246):

> " * * * Section 9 (c) does not state whether or in what circumstances or under what conditions the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the state's permission. It establishes no criterion to govern the President's course. It does not

> require any finding by the President as a condition of his action. The Congress in section 9 (c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment."

and at page 248:

> "The Constitution provides that 'All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Article 1, § 1. And the Congress is empowered 'To make all laws which shall be necessary and proper for carrying into Execution' its general powers. Article 1, § 8, par. 18. The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."

In the case of *A. L. A. Schechter Poultry Corp.* v. *United States,* 55 S. Ct. 837, 846, Justice Hughes said:

> " * * * But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."

In Public Resolution 53 the President is given absolute discretion as to when the ban provided for by the Resolution should be lifted. No standards are set by Congress, and clearly the Resolution is an abdication of legislative power belonging to Congress.

POINT IX.

The debt-funding agreement of June 23, 1930 does not confer upon Congress the right of re-seizing the property or postponing its return.

Upon the argument in the court below it was contended by the appellees that the Debt-Funding Agreement (Annual Report of Secy. of Treasury for year ending June 30, 1930 (pp. 341-347) 71st Congress, 3rd Session—House Doc. 526) expressly permitted a re-seizure of the property directed to be returned by the Settlement of War Claims Act. The basis for this contention is the following language in the said Debt-Funding Agreement:

> "Nothing contained herein shall be construed as requiring the United States to release any German property which it now holds *other than as heretofore* or hereafter *authorized by the Congress of the United States.*" (Italics ours.)

It is our view that this language supports the attitude of the appellant because the Settlement of War Claims Act, which was passed in 1928, and therefore approximately two years prior to the Debt-Funding Agreement, directed the release of German property by the United States. It therefore constitutes a matter

> "heretofore * * * authorized by the Congress of the United States"

within the language of such agreement.

In other words, if the Settlement of War Claims Act had been mentioned specifically in the above quoted language instead of by general statement, the language would be as follows:

> "Nothing contained herein shall be construed as *requiring the United States to release* any German property which it now holds *other than* as provided by the Settlement of War Claims Act of 1928." (Italics ours.)

In other words, it is a recognition not only by Germany but by the United States as well that it is "required" to release such German property as it had theretofore directed to be released under the Settlement of War Claims Act.

Not only is our contention in this respect clear as a matter of law, but the practical construction thereafter given by the acts of the United States is to the same effect, because from June 23, 1930 until the date of the Joint Resolution here involved—a matter of just about four years—the United States had continued without any question whatever to return to Germans the 80% of their property to which those Germans were entitled who had filed the necessary consent under subdivision (m) of Section 9 of the Trading with the Enemy Act to the temporary withholding and investment of 20% of their property.

There was certainly nothing in the Funding Agreement of June 23, 1930 by which the United States intended to relinquish its right—and it was a right—to uphold its tradition against confiscating private enemy property.

It should be remembered and emphasized that the participation of the United States in the Debt-Funding Agreement was by authority of the Act of Congress approved June 5, 1930 (Pub. No. 307—71st Congress) which was an Act "to authorize the settlement of the indebtedness of the German Reich to the United States on account of the awards of the Mixed Claims Commission, United States and Germany, and the costs of the United States

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Army of Occupation". It should also be remembered and emphasized that under the Debt-Funding Agreement the United States agreed to accept the bonds of the German Government in payment of such awards and costs. And Section 4 of the Agreement specifically provided:

> "4. Security.—The United States hereby agrees *to accept the full faith and credit of Germany as the only security and guaranty* for the fulfillment of Germany's obligations hereunder." (Italics ours.)

That language is clear and unambiguous, but we have the further assurance of its unmistakable intent in the exchange of notes simultaneously with the execution of the Agreement wherein it is stated:

> "(a) In respect of the acceptance by the United States of the full faith and credit of Germany as the only security and guaranty for the fulfillment of Germany's obligations under the agreement, *Germany will be in the same position as the principal debtors of the United States under the debt funding agreements which exist between them and the United States.*
>
> (b) Nothing contained therein shall be construed as requiring the United States to release any German property which it now holds *other than as heretofore* or hereafter *authorized by the Congress of the United States.*" (Italics ours.)

Can there by any doubt that the United States recognized that, by the Settlement Act of March 10, 1928, the United States was required to release the property because it was property, the release of which, had "heretofore" been "authorized by the Congress of the United States"? Can there be any doubt that the United States, pursuant to an

act of Congress, agreed with Germany that, in consideration for the delivery to the United States of bonds of the German Government, as security for the payment of amounts due the United States and its nationals under the Treaty of Peace, the United States would return to German nationals their property authorized and directed to be returned by the Settlement Act of 1928 and would only look to the full faith and credit of the German Government itself for the payment of the bonds?

Is the above quoted provision of the Debt-Funding Agreement, that by the acceptance by the United States of the full faith and credit of Germany as the *only security and guaranty* for the fulfillment of Germany's obligations, *"Germany will be in the same position as the principal debtors of the United States under the debt-funding agreements which exist between them and the United States"*, meaningless? Would it be contended that the United States can or would confiscate the property of British, French, and other nationals in the United States to secure the payment of the indebtedness to the United States by such countries under their debt funding agreements? Certainly not and no one would seriously contend that such could be constitutionally done. How then can it be contended that the property of German nationals in the United States is in any different status in the face of the agreement that Germany is "in the same position" as such other countries.

And, in the face of the Settlement Act of March 10, 1928 vesting the property in the individual owners thereof and in the face of the Debt-Funding Agreement of June 23, 1930, executed under authority of the Act of June 5, 1930, how can it be contended that Congress could by the Public Resolution of June 27, 1934, take away from such owners their vested rights of property?

POINT X.

Postponement of the return of property, like the postponement of the payment of a debt, constitutes a deprivation of property just as much as the taking of the property itself.

In *Louisiana* v. *New Orleans*, 102 U. S. 203, Justice Field said at page 207:

> "The Latin proverb, *qui cito dat bis dat*,—he who gives quickly gives twice,—has its counterpart in a maxim equally sound,—*qui serius solvit, minus solvit*,—he who pays too late, pays less."

If the United States Government, through Congress, has revested title in the former owner, or directed the immediate return of the property and such return is thereafter postponed by the Act of Congress, such Act of Congress lessens the value of that property to the former owner, and if no compensation is given for such taking such postponement of the return of the property is just as much a deprivation of property as the taking of part of the property itself.

Under the guise of a mere "postponement" of the return of this vested property, the Joint Resolution actually confiscates it. For it cannot be returned (except in the President's discretion), until Germany has paid its debt to the United States, which may never be. Such failure to pay, up to the present time, is either due to Germany's inability to pay, or to its unwillingness. There is nothing to indicate that its ability to pay will increase in the future; or that, if it be unwillingness, its attitude will change. In either event, a withholding

until the occurrence of something that may never happen, is outright confiscation with not even a provision for interest in the meantime. Under such circumstances the use of the word "postponement" is not even comportable with the policy of a government which throughout its history has disdained the exercise of the power of confiscation.

The Joint Resolution now under advisement would authorize the retention of money until such time as Germany pays the debt specified therein. And as that may never occur because of the possible continuing inability of the German Government to pay, such withholding might well, and in fact would constitute confiscation which the United States has definitely determined not to invoke even though it had the power (heretofore given up by it) so to do.

Upon the argument in the court below the appellees referred to the fact that the German nationals had the privilege of looking to their own Government for compensation had the United States confiscated. Not only was this alleged right long ago recognized as of no value to the former German owners of seized property, but if it had been, it was a right which they were induced to give up and forego when the United States definitely agreed to return 80% of their property immediately and the other 20% ultimately, in consideration of such German owners consenting to the temporary withholding of such 20%.

We reiterate and emphasize that what the Resolution purports to do is to withhold the payment of the property of plaintiff-appellant and others until the Government of Germany shall cease to be in arrears in payments due under the debt funding agreement of June 23, 1930 between Germany and the United States. And, as its predicate for the

Resolution, Congress cites its Resolution of July 2, 1921, the treaty of August 25, 1921, and the agreement between Germany and the United States setting up the Mixed Claims Commission. But the fact remains that, subsequent to those dates, and on March 10, 1928, Congress, which had theretofore enjoyed complete dominion and control over the property to the exclusion of any rights of the owners therein, definitely and conclusively determined and legislated that thereafter the property would be that of this plaintiff-appellant and other owners and that this plaintiff-appellant should have and receive eighty per cent. thereof if it consented to the postponement of the payment of twenty per cent. thereof. Thus, were the rights of the United States and the owners in the property fixed and thus did the United States relinquish in favor of the owners all dominion and control as to eighty per cent. thereof and retain dominion and control, *with the consent of the owners,* over twenty per cent thereof.

Not only that, but this plaintiff-appellant acted under and pursuant to the statute and, by such action, availed itself of all its rights under the statute.

Furthermore, as we have hereinbefore pointed out (Point IX), it was agreed in the Debt-Funding Agreement of June 23, 1930, made pursuant to and under authority of an Act of Congress, that the United States would look to the German Government for payment of that Government's debts to the United States in the same manner as it looks to the other Governments with which it has debt-funding agreements and that the property of German nationals, which Congress had directed by the Settlement Act of March 10, 1928, be returned to the German nationals, should no longer be held as

security for the payment of losses suffered by the United States and its nationals as a result of the war. In fine, by the passage of the Settlement Act of 1928 and by the subsequent Debt-Funding Agreement between Germany and the United States, the United States specifically waived and released its right, under the Peace Resolution of July 2, 1921 and the Treaty of August 25, 1921, to retain the property, directed to be returned under the Settlement Act of March 10, 1928, as security for the payment of Germany's obligations growing out of the war.

Obviously, there is and can be no power in Congress to again assume dominion and control over this property of friendly aliens, either for the purpose of forcing payments due the United States from Germany under the debt-funding agreement or for the purpose of now confiscating the property and using it in satisfaction of debts due the United States from Germany.

POINT XI.

If Public Resolution No. 53 is unconstitutional then plaintiff-appellant is entitled to the return of its property, and it is immaterial whether this action is regarded as an action against the United States or against the present holder of the property belonging to the plaintiff-appellant.

Our sole contention is that Public Resolution No. 53 is unconstitutional. It is not disputed if that act is unconstitutional plaintiff-appellant would be entitled to the return of the property and that plaintiff-appellant would be entitled to bring

suit under Section 9 of the Trading with the Enemy Act. The provisions of that section are set forth in full under Point IV of this brief.

Therefore, it is immaterial whether or not this is a suit against the United States.

POINT XII.

The Public Resolution delaying the return of the property of former German owners so long as Germany is in arrears in the payment of principal and interest on the debt-funding agreement between Germany and the United States, not providing that German owners shall not bring any suit, does not disable the plaintiff-appellant from maintaining the present action.

Public Resolution 53 under discussion, does not contain any language forbidding the maintenance of actions; it simply forbids the return of any further property while Germany is in default. If the act is a nullity, and the provisions of the Settlement of War Claims Act are operative, since that act expressly permits the bringing of an action to recover property, and since Public Resolution No. 53 does not forbid the bringing of any action, but merely directs that no further property shall be returned, it cannot properly be claimed by the defendants-appellees that Congress has expressly forbidden the maintenance of this present action.

In order that a person shall be deprived of the right to maintain an action accorded under a previous statute of Congress, the second act of Congress must expressly provide for forfeiture of such right, and since the subsequent act does not pro-

vide for the forfeiture of such right, the right to maintain an action thus accorded cannot be vitiated unless the subsequent act validly deprives him of the substantive rights, the basis of the former statute.

In the case of *Lynch* v. *United States,* 292 U. S. 571, 54 S. Ct. 840, the Supreme Court held that unless the right to sue was expressly taken by Congress from a war risk insurance claimant such claimant could not be deprived of his rights under a war risk policy by an unconstitutional repudiation of a contract by a statute providing for nonpayment of the policy. Its language on this subject is as follows (p. 845):

> "The question requiring decision is, therefore, whether in repealing 'all laws granting or pertaining to yearly renewable term insurance' Congress aimed at the right or merely at the remedy. It seems clear that it intended to take away the right; and that Congress did not intend to preserve the right and merely withdraw consent to sue the United States. As Congress took away the contractual right, it had no occasion to provide for withdrawal of the remedy. Moreover, it appears both from the language of the repealing clause and from the context of section 17 that Congress did not aim at the remedy. The clause makes no mention of consent to sue. The consent to sue had been given originally by section 405 of the Act of 1917 (40 Stat. 410) which, like the later substituted sections, applied to all kinds of insurance, making no specific reference to yearly renewable term policies. Obviously Congress did not intend to repeal generally the section providing for suits."

If Congress had intended to deprive the German owners of the right to sue in 1934, six years after

the Settlement of War Claims Act, Congress would expressly have made provision to that effect.

The Independent Offices Appropriation Act for 1934 expressly provides with respect to the 2% tax as follows:

> "Nor shall any suit be instituted or maintained against the Alien Property Custodian".

All that Public Resolution No. 53 does is—

> to "postpone"
>
> "any and all payments, conveyances, transfers or deliveries of money or property, or the income, issues, profits and/or avails thereof, authorized or directed to be made under the Trading with the Enemy Act as amended, or the Settlement of War Claims Act of 1928 as amended, whether or not a judgment or decree has been entered with respect thereto."

This language indicates that the right of suit to establish ownership, or the right to recover, was not to be deemed barred so that only the *delivery* of the property, and not the institution of suits to establish ownership, and recovery, if and when the embargo is lifted, is temporarily barred.

Public Resolution No. 53 is also distinguishable from the decision in *Kogler* v. *Miller*, 288 Fed. Rep. 806, 808, because at the time of that case returns to aliens were still a matter of grace and favor, Congress not yet having established its definite policy as it ultimately did in the Settlement of War Claims Act. The right to sue in 1923 was open only to very restricted classes and at that time Congress could narrow or widen the class as it saw fit.

This condition was altered after the Settlement of War Claims Act in that definite legal and vested rights were granted to the specific owners of the

property in the Custodian's hands who could prove their ownership in the property.

By virtue of the Settlement of War Claims Act the United States did consent to be sued, and if the Settlement of War Claims Act conferred vested rights upon the former enemies, such consent cannot be withdrawn.

In the case of *Henkels* v. *Sutherland,* 271 U. S. 298, 46 S. Ct. 524 in which the Government attempted to apply the rule, that it could not be sued without its consent, to a case of erroneous seizure of property belonging to an American citizen as against his claim that he was entitled to interest as well as to the principal, Justice Sutherland said:

> "The Government cannot be sued without its consent, and, accordingly, it canot be sued for interest unless it consents to be liable therefor. But the claim here is not for interest to be paid by the United States in the sense of the rule."

So, here, the former enemy owner has become an alien friend whose property is entitled to be protected against confiscation just as in the *Henkels* case, *supra,* it was held that the denial of the right to recover interest would constitute confiscation.

POINT XIII.

Taking for granted that the Treaty of Berlin authorized Congress permanently to confiscate German property, Congress not having availed itself of that right, but having, subsequent to the Treaty of Berlin, passed the Settlement of War Claims Act, the Treaty of Berlin is immaterial.

It is contended by the defendants-appellees that the Treaty of Berlin expressly reserved the privi-

leges accorded to the allies under Article 297, Section IV, Part X of the Treaty of Versailles.

The pertinent provision of the Treaty of Berlin (November 14, 1921, U. S. Stat. L., Vol. 42, part 2, p. 1938) is as follows (Trading with the Enemy Act by Meares, p. 512):

> "Germany undertakes to accord to the United States and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States.
>
> ARTICLE II.
>
> "With a view to defining more particularly the obligations of Germany under the foregoing Article with respect to certain provisions in the Treaty of Versailles, it is understood and agreed between the High Contracting Parties:
>
> "(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1, of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV."

Paragraph 1 of the Annex to Article 297, Section IV, Part X, of the Treaty of Versailles contains the following provision:

> "Every action taken with regard to any property, business, or company, whether as regards its investigation, sequestration, compulsory administration, use, requisition, super-

> vision, or winding up, the sale or management of property, rights or interests, the collection or discharge of debts, the payment of costs, charges, or expenses, or any other matter, whatsoever, in pursuance of orders, directions, decisions, or instructions of any court or of any department of the Government of any of the High Contracting Parties, made or given, or purporting to be made or given, in pursuance of war legislation with regard to enemy property, rights or interests, is confirmed."

A reading of these provisions indicates that any act performed by way of compulsory disposition of the property is thereby ratified. Therefore, any sale of the property in its original state is thereby ratified, and any permanent confiscation, if such had taken place, would have been ratified. But nowhere in any of the provisions cited is there any statement that the disposition made by Congress after the enactment of this Treaty, namely, the return thereof, shall be deemed ineffectual.

Consequently these provisions of the Treaty of Berlin and the Treaty of Versailles are utterly immaterial. They might have authorized a permanent confiscation had Congress seen fit to do so, but Congress did not take advantage of the privilege of permanent confiscation which might have been undertaken as an exceptional war measure. Congress wisely did not adopt this policy.

POINT XIV.

The *Chemical Foundation* case, 272 U. S. 1, 47 S. Ct. 1, has no application whatsoever.

In that case it was held that the sale by the Alien Property Custodian, authorized by the Trad-

ing with the Enemy Act, could not be questioned. The *Chemical Foundation* case does not deprive the owners of the property sold of their right to recover the proportionate part of the proceeds of the sale of the patents, the subject of such sale. In fact they have recovered it.

With regard to the *Chemical Foundation* case the Senate Report No. 273, 70th Congress, 1st Session, says as follows (p. 13):

> "So that notwithstanding the undoubted power of Congress to confiscate, reaffirmed in the *Chemical Foundation* case, Congress not only has refused to exercise that power up to the present time but has clearly by legislation asserted its policy to be the very contrary of confiscation."

Therefore, though Congress did have the privilege of confiscation it did not exercise this privilege; it returned the property, and it cannot now take back that which it has returned.

No further confiscation or seizure in time of peace can lawfully be made. The war is over and has been for some time. Moreover, when it is considered that 95% of the property has been returned, it would seem extraordinary to impose the new seizure on the 5% remnant, return of which was delayed merely by the filing of third-party attachments, now dissolved.

POINT XV.

Congress having surrendered all dominion over the property except as to taxes, 20%, and expenses, the Joint Resolution is a confiscation of the property of an alien friend.

We are now at peace with Germany. To take away the property of any of its citizens in time of

peace is a violation of the Fifth Amendment. The power to confiscate the property of an alien does not exist in time of peace. The Fifth Amendment applies to a friendly alien as much as to a citizen of the United States.

That was the holding of the United States Supreme Court in the case of *Russian Volunteer Fleet* v. *United States,* 262 U. S. 481, 51 S. Ct. 229, where the Court stated at page 231:

> "The petitioner was an alien friend, and as such was entitled to the protection of the Fifth Amendment of the Federal Constitution."

It is true during time of war the power to confiscate might exist if Congress saw fit to exercise it; but such a power does not exist in time of peace.

Brown v. *United States,* 8 Cranch. 110.

To enforce the provisions of Public Resolution No. 53 is to hold the property of one person in order to force another to pay its debts. No authority for such proposition can be adduced.

To deprive a person of a vested right has been held time and again to be unconstitutional. Under the circumstances, therefore, Public Resolution No. 53 must be held a violation of the Fifth Amendment, and consequently void.

POINT XVI.

Plaintiff-appellant should not be penalized for the delay on the part of the Custodian in carrying out the statutory direction to make a return.

The cause of the delay in the return of plaintiff's property is the fact that this property was subject to an attachment in an action which has been

discontinued. This discontinuance occurred in May, 1934. The Public Resolution was not enacted until June 23, 1934.

Prior to the enactment of the Public Resolution millions of dollars of property had been returned to the German owners. The plaintiff-appellant stands before the court penalized because of the fact that an unwarranted attachment had been levied upon its property.

Since the direction of the statute is mandatory there is no warrant in law for the Custodian's disobedience of the statutory direction, and there is no reason why the plaintiff-appellant should be placed in any other position than the many other German owners who have had their property returned before the passage of the Public Resolution.

Therefore, there is totally unjust discrimination between the owners who have had their property returned in accordance with the direction of statute and those who are suffering by reason of the unjust delay of the Government.

POINT XVII.

The decree appealed from should be reversed and the motion to dismiss the complaint should be denied and judgment directed in favor of the plaintiff-appellant.

Respectfully submitted,

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ANNEX A.

73d Congress
2d Session

PUBLIC RESOLUTION NUMBER 53, 73D CONGRESS.

JOINT RESOLUTION

To amend the Settlement of War Claims Act of 1928, as amended.

WHEREAS the joint resolution of the Congress of the United States, approved July 2, 1921, provides in part as follows:

> "Sec. 5. All property of the Imperial German Government, or its successor or successors, and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whatsoever, * * * shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government * * * shall have * * * made suitable provision for the satisfaction of all claims against said (Government) * * *, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agent, * * * since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German * * *, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise * * *."

WHEREAS the Treaty between the United States and Germany of August 25, 1921, incorporated said provisions of such joint resolution and also provided in article I thereof as follows:

> "Germany undertakes to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States."; and

WHEREAS by the agreement of August 10, 1922, between Germany and the United States, a Mixed Claims Commission was established to adjudicate claims of American nationals against Germany arising out of the World War; and

WHEREAS under the terms of the debt-funding agreement between Germany and the United States dated June 23, 1930, Germany agreed to pay to the United States in satisfaction of Germany's obligations remaining on account of awards, including interest thereon, entered and to be entered by the Mixed Claims Commission, United States and Germany, the sum of 40,800,000 reichsmarks for the period September 1, 1929, to March 31, 1930, and the sum of 40,800,000 reichsmarks per annum from April 1, 1930, to March 31, 1981; and

WHEREAS Germany is now in arrears in payments due under said debt-funding agreement between Germany and the United States, and has, accordingly, failed to make suitable provision for the satisfaction of the said claims against Germany:

Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That so long as Germany is in arrears in any payments of principal or interests, including interest at the rate of 5 per centum per annum on principal installments not paid when due, under the debt-funding agreement between Germany and the United States, dated June 23, 1930, with respect to Germany's obligations remaining on account of awards, including interest thereon, entered and to be entered by the Mixed Claims Commission, United States and Germany, any or all payments, conveyances, transfers, or deliveries of money or property or the income, issues, profits, and/or avails thereof authorized or directed to be made under the Trading with the Enemy Act, as amended, or the Settlement of War Claims Act of 1928, as amended, whether or not a judgment or decree has been entered with respect thereto, shall be postponed and the money or property, or the income, issues, profits and/or avails thereof reserved: *Provided, however,* That such of the funds as are from time to time available (without taking into consideration interest thereafter accruing) under the Settlement of War Claims Act of 1928, as amended, for the payment of principal and interest upon awards of said Mixed Claims Commission shall be applied when available to the payment of principal and interest upon such awards in the same manner and to the same extent as though certain of the payments provided for in said Act had not been postponed under this resolution: *Provided further,* That the President may, in

his sole discretion, remove the restriction as to any of the cases or classes of cases in relation to which payments, conveyances, transfers, or deliveries have been postponed: *And provided further,* That the action of the President in determining the period or periods in which Germany is in arrears in the payments hereinbefore described shall not be subject to judicial review.

COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA
FILED NOV 19 1935
Henry W. Harper

No. 6471

In the United States Court of Appeals for the District of Columbia

DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT, A CORPORATION, APPELLANT

v.

HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES, AND W. A. JULIAN, AS TREASURER OF THE UNITED STATES, APPELLEES

BRIEF FOR THE APPELLEES

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Attorneys for Appellees.

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In the United States Court of Appeals for the District of Columbia

No. 6471

DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT, a Corporation, appellant

v.

HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE United States, and W. A. Julian, as Treasurer of the United States, appellees

BRIEF FOR THE APPELLEES

STATEMENT

Pursuant to the provisions of the Trading with the Enemy Act, the Alien Property Custodian had seized property of the Direction der Disconto Gesellschaft, a German corporation (R. 3). The appellant corporation, as its successor, acting under the terms of the Trading with the Enemy Act, as amended by the Settlement of War Claims Act of 1928 (45 Stat. 254), filed a notice of claim with the Alien Property Custodian and requested the return to it of 80% of the property which had been so seized (R. 3).

Because of the injunctive effect of an action brought by one William H. Sprunt and others, the

administrative return of this property could not lawfully have been made between the date of the institution of the action on March 16, 1931, and the date of its dismissal on May 24, 1934 (R. 4).

On June 27, 1934, Congress enacted Public Resolution No. 53 (48 Stat. 1267), the text of which appears as Appendix A.

On October 3, 1934, the appellant instituted the present suit in the Supreme Court of the District of Columbia (R. 2). To this bill of complaint, the appellees filed a motion to dismiss upon the ground that the lower court was without jurisdiction because, by Public Resolution No. 53, 73d Congress, the return of the property, as prayed for in the appellant's bill, has been postponed and the money or property and the income, profits, and avails thereof reserved (R. 7).

This motion to dismiss for want of jurisdiction was sustained (R. 8), and this is an appeal from the order and decree dismissing the bill of complaint which was entered by the lower court (R. 8).

ARGUMENT

I

The Supreme Court of the District of Columbia is without jurisdiction to entertain this action

A. A suit for the return of property seized under the Trading with the Enemy Act is essentially a suit against the United States

It is now firmly established that upon the seizure of property by the United States under the Trading with the Enemy Act, the enemy owner was di-

vested of every right, title, and interest therein; *United States* v. *Chemical Foundation,* 272 U. S. 1 (1926); *Woodson* v. *Deutsche, etc., Vormals,* 292 U. S. 449 (1934).[1] As stated by the Supreme Court in the *Woodson* v. *Deutsche, etc., Vormals case* (pp. 453, 454):

> The Trading with the Enemy Act was passed by Congress in the exertion of the war power; its purpose was to weaken enemies by diminishing the sources from which they could obtain aid, and to strengthen this country by adding to resources for the successful prosecution of the

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[1] The case of *Commissioner of Internal Revenue* v. *Stearns,* 65 F. (2d) 371, cited by the appellant, is not contrary to these decisions of the Supreme Court of the United States. In that case it appeared that certain shares and bonds had been returned by the Alien Property Custodian to an administrator c. t. a., the German owner having died during the period that the property was held by the Custodian. The administrator sold these shares and bonds, and computed his taxable profit upon the value of the property at the time it was received by him from the Custodian. The Commissioner of Internal Revenue assessed the administrator for a profit based upon the value at the time of the testator's death. The court upheld the action of the Commissioner and stated that despite the seizure and transfer of title to the Custodian, still it could be said that the former owner retained some "interest" which upon death passed to an administrator. It is to be noted that this was a tax case requiring strained concepts to support it. To state that there existed, for the purpose of determining a tax base, an expectancy in the original owner, is far different from asserting that the original owner had a vested interest in the property held by the Alien Property Custodian. (See Note (1933) 2 Geo. Wash. L. Rev. 104.)

> war. Section 12 declares that after the end of the war any claim of any enemy to recover money or property received and held by the Custodian or deposited in the United States Treasury "shall be settled as Congress shall direct." 40 Stat. 424. While this suggests that confiscation was not effected or intended, it plainly shows that Congress reserved to itself full freedom at any time to dispose of the property as might be deemed expedient and to deal with claimants as it should deem to be in accordance with right and justice, having regard to the conditions and circumstances that might arise during *and after* the war. *It is clear the enemy owners were divested of every right in respect of property taken and held under the Act. United States* v. *Chemical Foundation,* 272 U. S. 1, 9–11. (Italics supplied.)

In *Henkels* v. *Sutherland,* 271 U. S. 298, Mr. Justice Sutherland stated: "With enemy-owned property . . . the United States may deal with as it sees fit", citing as authority for that statement the opinion of Mr. Justice Holmes in *White* v. *Mechanics Securities Corporation,* 269 U. S. 283, wherein the late Justice observed:

> The funds were seized adversely by the United States in time of war. They are in its hands; it has declared by an Act of Congress what shall be done with them, and that is the end of the matter.

It is equally well settled that a suit for the recovery of enemy property seized under the Act is

a suit against the United States and can only be brought if the United States has given its consent to be sued. *Becker Steel Co.* v. *Cummings,* decided by the Supreme Court of the United States, November 11, 1935; *Banco Mexicano* v. *Deutsche Bank,* 263 U. S. 591 (1924), affirming 53 App. D. C. 266; *Von Bruning* v. *Sutherland,* 58 App. D. C. 258, 29 F. (2d) 631 (1928); *Synthetic Patents Co.* v. *Sutherland,* 22 F. (2d) 491 (C. C. A. 2nd 1927).

Section 9 of the Trading with the Enemy Act is the only statutory authority for suits to recover property or money in the possession of the Alien Property Custodian or the Treasurer of the United States. The lower court has no jurisdiction under its general equity powers to entertain a suit against the Custodian or the Treasurer of the United States. As stated by this Court in *Crone* v. *Sutherland,* 63 F. (2d) 895, 896 (1933):

> Plaintiff's property was seized adversely by the United States in time of war. All right of plaintiff in the property was gone until Congress saw fit to extend relief. Plaintiff, therefore, is not in position to invoke the general equity jurisdiction of the courts. Her remedy is the special one accorded by section 9 of the Trading With the Enemy Act, as amended, 42 Stat. 1514 (50 U. S. C. A. Appendix Sec. 9 and note). *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554, 568, 41 S. Ct. 214, 65 L. Ed. 403; *Stoehr* v. *Wallace,* 253 U. S. 239, 243, 41 S. Ct. 293, 65 L. Ed. 604.

B. The Trading With the Enemy Act does not confer jurisdiction upon the lower courts to entertain a suit for the release of property, the return of which has already been ordered by the Alien Property Custodian

As outlined above, the right to recover under the Trading with the Enemy Act is limited to conditions laid down in § 9. Where a statute provides a special remedy against the United States, that remedy is exclusive. *United States* v. *Babcock,* 250 U. S. 328 (1919).

Section 9 of the Trading with the Enemy Act (Appendix "B") provides that after filing a notice of claim with the Alien Property Custodian, a proper claimant may bring suit at once to secure the return of property held by the Custodian or by the Treasurer of the United States, and further provides that if application is made to the President for an administrative allowance of the claim, the claimant may, after sixty days, bring suit *"if the President shall not so order."*

The power of the President under the Act to order the return of property to German nationals was, by Executive Order No. 4862, of April 23, 1928 (Appendix "C"), vested in the Alien Property Custodian. The bill of complaint (par. 10, R. 3) shows that this power was exercised by the Custodian as to the appellant's claim and the property sought was ordered to be returned. Thereafter, the enactment of Public Resolution No. 53 made the carrying out of this order improper and unlawful. The appellant, desiring to question the

constitutionality of that resolution, has misconceived its remedy. Suit under the Trading with the Enemy Act is not authorized where it appears, as it does in this case, that the President, acting through a duly appointed agent, has already ordered the return of the property prayed for. The lower court under such circumstances is without jurisdiction to entertain the action.

C. By Public Resolution No. 53, 73rd Congress, Congress has withdrawn the consent of the United States to be sued by a German national for the return of any property seized under the Trading With the Enemy Act, as amended

Assuming for the purpose of argument that the lower court might otherwise have jurisdiction to entertain a suit for the recovery of property after the return of said property has been ordered by the Custodian, still we must conclude that the lower court was without jurisdiction in the instant case because of the enactment of Public Resolution No. 53.

It has previously been shown that a suit for the recovery of enemy property seized under the Act is a suit against the United States, and can only be brought if the United States has given its consent to be sued.

The appellant, of course, does not place itself in the position of denying the line of authorities supporting this proposition, but instead asserts (p. 59, 60) that it is "immaterial whether or not this is a suit against the United States", because its "sole contention is that Public Resolution No. 53 is un-

constitutional." But this ignores the fact that whether or not Congress can withdraw and alter the jurisdiction of courts to order the return of property seized under the Trading with the Enemy Act must necessarily depend upon the nature of the jurisdiction which was prior thereto exercised by those courts.

That the United States cannot be sued without its consent is a proposition which admits of no contradiction. *Perry* v. *United States,* 294 U. S. 330 (1935); *Kawananakoa* v. *Polyblank,* 205 U. S. 349 (1906). And it is a corollary to this principle that Congress retains the power to withdraw its consent at any time. As stated by the Supreme Court in *Lynch* v. *United States,* 292 U. S. 571, 581 (1934):

> Although consent to sue was thus given when the policy issued, Congress retained power to withdraw the consent at any time. *For consent to sue the United States is a privilege accorded; not the grant of a property right protected by the Fifth Amendment.* The consent may be withdrawn, although given after much deliberation and for a pecuniary consideration * * * (citing cases). The sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced. It applies alike to causes of action arising under acts of Congress, *De-Groot* v. *United States,* 5 Wall. 419, 431; *United States* v. *Babcock,* 250 U. S. 328, 331; and to those arising from some violation of

> rights conferred upon the citizen by the Constitution. *Schillinger* v. *United States*, 155 U. S. 163, 166, 168. The character of the cause of action—the fact that it is in contract as distinguished from tort—may be important in determining (as under the Tucker Act) whether consent to sue was given. Otherwise it is of no significance. For immunity from suit is an attribute of sovereignty which may not be bartered away. (Italics supplied.)

This power to withdraw the consent of the United States to be sued is so complete that it can be invoked to deprive a court of jurisdiction after suit has been instituted and even after it has reached the Supreme Court of the United States. *In re Hall,* 167 U. S. 38 (1897); *District of Columbia* v. *Iselin,* 183 U. S. 62 (1901); *Imhof-Berg Silk Dyeing Co.* v. *United States,* 43 F. (2d) 836 (1930).

In *Kogler* v. *Miller,* 288 Fed. 806 (C. C. A. 3rd 1923) (Cited in the *Lynch Case,* Footnote 12), it appeared that a German citizen residing in the United States, and therefore not an enemy within the meaning of the Trading with the Enemy Act, had instituted a suit under Section 9 of that Act to recover for a debt owing to him by an enemy whose property had been seized by the Alien Property Custodian. After the commencement of this action, Congress amended the Act by adding Section 9 (e), which limited suits by creditors who were not United States citizens to suits for the recovery of only those claims which arose with refer-

ence to the particular property held by the Alien Property Custodian. The plaintiff did not fall within this qualification and his bill was therefore dismissed. The court said at page 808:

> This statute—Trading with the Enemy Act—as originally enacted was an announcement by the United States of the manner in which it proposed to exercise its sovereign right to seize property not of an enemy government alone but of its subjects. Having thus asserted its right of seizure, the government, had it chosen, could have stopped there and have made no provision for the release of seized property either to its owner or to anyone else. But Congress was inclined to be generous and, accordingly, provided by Section 9 of the Act two things. * * * Until Congress had so acted, a person having an interest in property seized or having a claim against the owner of property seized had no right to assert it against the property in the hands of the Alien Property Custodian or against the proceeds of its sale in the hands of the Treasurer of the United States. *When Congress did so act, a claimant or creditor had such a right, but only so long as Congress saw fit to continue it.* The opportunity which Congress afforded one claiming an interest in or asserting a debt against seized property was more in the nature of a privilege than a right. But whether a right or a privilege it was created and conferred by Congress and continued only by its grace. *The statute did not*

> *vest this right or privilege in a claimant to the property or in a creditor of a debtor whose property had been seized in the sense that he might not be divested of it when and in any manner Congress might prescribe.* (Italics supplied.)

The case at bar raises a situation analogous to that in *Kogler* v. *Miller, supra,* and in addition is further fortified by the fact that in the instant case, the suit was not instituted until after the passage of Public Resolution No. 53.

Public Resolution No. 53, 73rd Congress, 48 Stat. 1267, was approved by the President June 27, 1934 (Appendix "A"). It provided in part that:

> All payments, conveyances, transfers, or deliveries of money * * * authorized or directed to be made under the Trading with the Enemy Act, as amended, or the Settlement of War Claims Act of 1928, as amended, whether or not a judgment or decree has been entered with respect thereto, shall be postponed and the money or property * * * reserved.

It is true that this Resolution does not recite in so many words that *no suits* shall be brought under the provisions of the Trading with the Enemy Act. But it does provide that no payments or conveyances of property shall be made whether or not a judgment has been entered with respect thereto. This court, acting either as a legislative court or as a judicial court, will not stultify itself by rendering a judgment, the payment of which Congress

has prohibited, and which must necessarily amount to nothing more than an advisory opinion. In *District of Columbia* v. *Iselin,* 183 U. S. 62, wherein it appeared that Congress had removed the jurisdiction of the Court of Claims in certain cases, and had ordered that no judgments in these cases should be paid, the Supreme Court of the United States considered itself deprived of appellate jurisdiction, and the court's opinion emphasized the fact that it was improper for it to render a judgment against the United States where it appeared that Congress had directed or indicated that it would neither recognize nor satisfy it. The court, speaking through Mr. Justice Harlan, said (p. 65):

> It was an act of grace upon the part of the United States to provide for the payment by the Secretary of the Treasury of the amount of any final judgment rendered under that act. And when Congress by the act of 1897 directed the Secretary not to pay any judgment based on the act of 1895, that officer could not be compelled by the process of any court to make such payment in violation of the act of 1897. A proceeding against the Secretary having that object in view would, in legal effect, be a suit against the United States; and such a suit could not be entertained by any judicial tribunal without the consent of the Government. It seems, therefore, clear that a declaration by this court in relation to the

> matters involved in the present appeal would be simply advisory in its nature, and not in any legal sense a judicial determination of the rights of the parties.

In addition it must be noted that even if it be admitted that Public Resolution No. 53 merely removes the power of a court to order the immediate return of property without removing its jurisdiction to render an opinion establishing the claimant's ownership in such property, nevertheless such a "declaratory judgment jurisdiction" does not exist where the right, title, or interest claimed is recognized and admitted by the United States. In the case at bar it affirmatively appears in the bill of complaint (par. 10, R. 3) that the Alien Property Custodian has determined that the appellant is the owner of the property claimed. There exists no dispute of ownership upon which to predicate jurisdiction to render a declaratory judgment.

The memorandum of the court below (R. 8) succinctly states the arguments that have heretofore been presented and we can do no better than to repeat it as a final summary:

> I think that Congress has full power to dispose of enemy property seized by the Alien Property Custodian, and make such changes in regard to that disposition as may from time to time seem advisable. The courts have uniformly held that a suit against the Alien Property Custodian is a suit against the United States, and have also held that

> Congress may grant and may withdraw the privilege of bringing suit against the United States. When that privilege is withdrawn, the courts are powerless to act. I can see nothing unconstitutional in the withdrawal by Congress of this privilege, and the motion to dismiss the bill of complaint should be sustained.

II

A. The appellant is precluded by the Treaty of Berlin from questioning the validity of Public Resolution 53 and the detention of property which that resolution requires

The Treaty of Berlin, concluded between the United States and Germany on August 25, 1921, and proclaimed on November 14, 1921 (42 Stat. 1939), expressly reserved for the benefit of the United States all of the beneficial provisions of the Treaty of Versailles and particularly those defined in Section I of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV. This Treaty is binding upon the nationals of the signatory powers. *Ware* v. *Hylton,* 3 Dallas 199 (1796); *Mairano* v. *Baltimore & Ohio R. R. Co.,* 213 U. S. 268 (1909); *Klein* v. *Palmer,* 18 F. (2d) 932 (C. C. A. 2d, 1927). Paragraph (d) of Article 297, Section IV, Part X, of the Treaty of Versailles, provides (p. 3462):

> As between the Allied and Associated Powers or their nationals on the one hand and Germany or her nationals on the other hand, *all the exceptional war measures,* or measures of transfer, or *acts done or to be done* in ex-

> ecution of such measures as defined in paragraphs 1 and 3 of the Annex hereto shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty. (Italics supplied.)

Paragraph 3 of the Annex to Section IV, Part X of the Treaty of Versailles which defines the term "exceptional war measures" reads as follows:

> In Article 297 and this Annex the expression *"exceptional war measures" includes measures* of all kinds, legislative, administrative, judicial, or others, *that* have been taken or *will be taken hereafter* with regard to enemy property, and which have had or will have the effect of removing from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form, or in whatsoever place. *Acts in the execution of these measures include all detentions,* instructions, orders, or decrees of Government departments or courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment

> of any costs, charges, or expenses, or the collecting of fees. (Italics supplied.)

Thus it appears that the Treaty of Berlin confirmed all actions that were taken or would thereafter be taken by Congress in "removing from the proprietors the power of disposition over their property." The Treaty specifically permitted measures of detention. Public Resolution No. 53, in removing the jurisdiction of the court to order the return of property to German nationals, and in postponing all payments formerly authorized to be made under the Trading with the Enemy Act, amounts to no more than a measure of detention. The postponement of the return of property to the appellant is clearly an act comprised within the definition,

> measures * * * which * * * will have the effect of removing from the proprietors the power of disposition over their property * * *

since paragraph 3 of the Annex to Section IV, Part X, specifically provides that

> Acts in the execution of these measures include all detentions * * *

The court's attention is invited to the fact that the same paragraph and the same sentence thereof of the Treaty of Versailles which confirms the sales and transfers of enemy property by the Custodian likewise confirms the management and administration of such property by the Custodian. A number

of suits have been instituted by German nationals questioning the validity of transfers of their property by the Custodian, and in each instance the court has sustained a motion to dismiss the suit, holding that the same was barred by Article 297 of the Treaty of Versailles. *Lang* v. *Wingrave,* 295 Fed. 565 (1924); *Klein* v. *Palmer,* 18 F. (2d) 932 (1927); *Munich Reinsurance Co.* v. *First Reinsurance of Hartford,* 300 Fed. 345 (1924), affirmed 6 F. (2d) 742 (1925), appeal dismissed 273 U. S. 666 (1927); see *United States* v. *Chemical Foundation,* 272 U. S. 1, 11 (1926).

It is apparent from the appellant's brief (p. 15) that it has misunderstood the Government's contention in respect to the Treaty of Berlin. The Government does not urge as an argument that the Treaty of Berlin confers the right of confiscation and it agrees with the appellant that such a right is inherent in the war powers of the United States. But the Government does urge that the Treaty of Berlin confirmed all measures of detention which might thereafter be enacted, and that, therefore, it is not for this appellant, a German corporation, to question the detention and reservation which is effected by Public Resolution No. 53. How long this bar shall continue is a matter for Congress to determine in its discretion, and it is not for a court to limit or to embarrass the sovereign's control of international relations. As was stated by Chief Justice Hughes in the recent case of *Burnet* v. *Brooks,* 288 U. S. 378, at page 396:

> As a nation with all the attributes of sovereignty the United States is vested with all the powers of government necessary to maintain an effective control of international relations. * * * "We should hesitate long", we said in *Mackenzie* v. *Hare,* 239 U. S. 299, 311, "before limiting or embarrassing such powers."

See also *Legal Tender Cases,* 12 Wall. 457, 555; *Fong Tue Ying* v. *United States,* 149 U. S. 698, 711.

B. Appellant's status as enemy continues for the purpose of this suit and it is not entitled to invoke protection of fifth amendment against a measure based on war power

It has long been established that the enemy status of a corporation, once determined an enemy within the definition of subsection (a) of Section 2 of the Trading with the Enemy Act, as amended, did not cease by reason of the Joint Resolution of July 2, 1921 (42 Stat. 105, c. 40), which officially declared the war at an end. Section 12 of the Trading with the Enemy Act (40 Stat. 411, 424) provides in part:

> After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury shall be settled as Congress shall direct.

As stated by Mr. Chief Justice Taft in *Swiss National Insurance Co.* v. *Miller et al.,* 267 U. S. 42 (1925):

> The argument for the appellant is that when the war ended, it ceased to be an enemy, and so the words quoted [§ 12, *supra*] do not apply to it. This is an impossible construction of the section. After the end of the war there could be no enemy in the sense in which the appellant argues. The word "enemy", used in § 12, of course, refers to the person who, or corporation which, fulfilled the definition of an enemy during the war. It follows that the right of the appellant to recover its property must depend on the congressional direction subsequent to the original act.

It is also well settled that this Act, whether taken as originally enacted, or as since amended, is strictly a war measure, finding its sanction in the Constitution, Art. I, § 8, Cl. 11. *Stoehr* v. *Wallace,* 255 U. S. 239; *Commercial Trust Co.* v. *Miller,* 262 U. S. 51. Where an act of Congress is an exercise of the war powers of the Government, it is clear that it is not affected by the restrictions imposed by the Fifth Amendment. *Miller* v. *United States* (*Page* v. *United States*), 11 Wall. 268; *Brown* v. *United States,* 8 Cranch 110. The limitations or restrictions of the Fifth Amendment cannot be invoked by plaintiff-appellant, therefore, since that amendment does not affect the exercise of the war power conferred upon Congress.

III

The Trading with the Enemy Act as amended by the Settlement of War Claims Act of 1928 did not confer upon the appellant any vested interest either in a right or in a remedy against the United States

A major portion of the arguments presented in the appellant's brief are, we believe, designed to establish the proposition that the Settlement of War Claims Act conferred certain "vested rights" upon former enemies, and that these "vested rights" cannot be affected by Congressional enactments. Perhaps the position of the appellant can best be expressed by repeating the appellant's own statement (p. 63):

> By virtue of the Settlement of War Claims Act, the United States did consent to be sued, and if the Settlement of War Claims Act conferred vested rights upon the former enemies, such consent cannot be withdrawn.

The appellees submit that the appellant is doubly in error; first, in the assertion that "vested rights" were conferred, and secondly, in the assertion that the consent of the United States to be sued cannot be withdrawn.

At the very outset we must determine what rights, powers, or privileges the appellant refers to when it uses the term "vested rights." It cannot be that the appellant is contending that one can acquire a vested right in the *remedy* of suit against the United States. More probably, the appellant wishes to distinguish between a "right"

and a "remedy" and desires to urge that the Settlement of War Claims Act conferred upon it a "right" which is analogous to the "right" conferred upon one who enters into a contractual relationship with the United States. *Even assuming that such a right was bestowed upon the appellant, it must be apparent that no constitutional guarantee has been infringed, because Public Resolution No. 53 amounts to no more than a removal of the "remedy" of suit against the United States. Lynch* v. *United States,* 292 U. S. 571.

We are loath, however, to permit the assertion that a vested right (as distinguished from a remedy) was conferred upon the appellant, to go unchallenged. Let us examine the events which serve as a background to the enactment of the Settlement of War Claims Act, and the events which took place thereafter and led up to the passage of Public Resolution No. 53. All these are matters which are subject to judicial cognizance.

The Trading with the Enemy Act. In its original form, the Trading with the Enemy Act provided for the seizure of all enemy property by the Alien Property Custodian, and left undecided the question as to what disposition was to be made of the property so seized. The Act effected a confiscation in the sense that the owner was divested of his title and interest, but it did not effect a confiscation in the sense that the United States had definitely appropriated the property to its own use.

The Knox-Porter Peace Resolution. A joint resolution terminating the state of war between the United States and Germany was adopted by Congress on July 2, 1921 (42 Stat. 105). This resolution stated that it would be the Government's policy to make no disposition of enemy property which had theretofore been seized, until the German Government had made suitable provisions for the satisfaction of all American claims.

The Treaty of Berlin.—The statement of policy in the Knox-Porter Peace Resolution was incorporated into the Treaty of Berlin of August 25, 1921 (42 Stat. 1939).

The Mixed Claims Commission.—On August 10, 1922, an agreement was entered into between Germany and the United States whereby a Mixed Claims Commission was established to determine the amount to be paid by Germany in satisfaction of its financial obligations under the Treaty of Berlin (42 Stat. 2200). This, then, was the first step undertaken by Germany in the direction of providing for the payment of American claimants.

The Winslow Act of 1923.—With the assurance given by the creation of the Mixed Claims Commission in mind, Congress in 1923, as an amendment to the Trading with the Enemy Act, passed what is known as the Winslow Act (42 Stat. 1511). By this amendment the President was permitted to return property to former German owners up to the value of $10,000. The District courts were also empowered to order the return of such property, if

the claimant could establish his original interest therein. Thus it is seen that Congress set in motion a procedure for the return of property to German nationals generally.

The Settlement of War Claims Act of 1928.—In 1928 the Settlement of War Claims Act further amended the Trading with the Enemy Act and enlarged the consent of the United States so that German nationals could receive 80% of the property which had been seized by the Alien Property Custodian (45 Stat. 254). It is obvious, of course, that the Settlement of War Claims Act was not the "suitable provision" for payment *by* the German Government which was called for in the Peace Resolution of July 2, 1921. Instead, that Act merely showed that Congress had decided not to adhere strictly to the limitations of the Peace Resolution, and that Congress was willing to make additional returns to Germans in anticipation of future settlements and adjustments between the two nations. In view of the attitude of the German Government, as expressed in the Treaty of Berlin; in view of the creation and conduct of the Mixed Claims Commission; and in view of the provision for the retention of 20% in a German special deposit account, Congress considered that it had sufficient assurance that Germany would ultimately settle her account. When the Debt Funding Agreement of 1930 was entered into it appeared that Congress had been correct in its assumption that Germany would pay her debts.

The Debt Funding Agreement of 1930.—On June 23, 1930, the United States and Germany executed an agreement providing for the settlement of claims of the United States and its citizens against the German Government. In brief, it provided that Germany was to pay 40,800,000 Reichsmarks for the period September 1, 1929, to March 31, 1930, and the sum of 40,800,000 Reichsmarks per annum from April 1, 1930, to March 31, 1981. (See Annual Report of the Secretary of the Treasury, 1930, p. 341.) It also stated that

> Nothing contained herein shall be construed as requiring the United States to release any German property which it now holds other than as heretofore *or hereafter* authorized by the Congress of the United States. (Italics supplied.)

The appellant in Point IX deliberately ignores the words "or hereafter" and asserts that the return of property to it is a return that was "heretofore authorized." But the provision reads, "heretofore or hereafter authorized" and the word "hereafter" cannot be disregarded. This stipulation in the Debt Funding Agreement when read without omissions manifests an intent on the part of Congress, with Germany's consent, to retain its absolute dominion over property held by the United States.

Following the execution of this Debt Funding Agreement, the United States, of course, continued to return property to German nationals under the authority of the Settlement of War Claims Act.

However, when it became apparent that Germany was either unwilling or unable to satisfy its obligations to the United States and to its citizens, then the very foundation upon which the Settlement of War Claims Act was based, collapsed. It was then that Public Resolution No. 53 was adopted.

In the light of this historical background, what arguments can be brought forth to sustain the assertion that Congress intended to confer vested rights upon the appellant? The appellant's brief, composed of 17 points and 8 subheadings, bids defiance to the making of a simple and logical analysis of its arguments. There do, however, appear to be two main thoughts—two lines of approach. One is that the Settlement of War Claims Act created an actual contract between the German claimants and the United States for the return of the property (see Point V) and the other is that the United States, in passing the Settlement of War Claims Act, thereby revested title in the former owners. (See Point III.)

The appellant, in an attempt to support the contract theory, refers to the Act as having been passed as a result of a compromise between the German claimants and the American claimants. (See Point VI.) It is quite obvious, of course, that the Act contains no *promise* on the part of the United States, upon which to support a contract and, in addition, it must be apparent that the compromise to which the appellant refers was in no sense a contractual compromise, but was merely the ordinary

"give and take" among interested parties which frequently precedes Congressional enactments.

In support of the theory that the Settlement of War Claims Act revested title in former enemies, the appellant notes that the title of the Act includes the word "Settlement" (p. 39), and finds comfort in such language as: "for the ultimate return of all property" (p. 17), and "temporarily withheld" (p. 26). The appellant also places weight upon the fact that the Act directs the court to order the return of the property seized by the Custodian to the former owners who established their interest therein. From this the appellant concludes that title revested in it in 1928 or at least at the time that it complied with the requirement of consenting to the retention of 20% of the property. But this provision authorizing the return of property is entirely consistent with the continued ownership of the property by the United States until the time that the final and actual conveyance is made. It is rather extraordinary to conclude that Congress intended to relinquish forever all control over the property it held and to vest title in persons whose interests, by the very terms of the Act, were to be thereafter determined and established.

It must be borne in mind that the discretionary power given to the President to return seized property, as an administrative act, and the jurisdiction conferred upon the courts to judicially determine the interests of claimants, was based upon the as-

sumption and implied condition that Germany would ultimately settle her account.

Since this appellant received no vested interest, either in a right or in a remedy against the United States, it cannot be successfully urged that Public Resolution No. 53, in removing the jurisdiction of the lower court to entertain the present action, violated any constitutional right of the appellant.

IV

Congress, by the Settlement of War Claims Act, did not relinquish all and every interest in property seized from German nationals under the Trading with the Enemy Act

That Congress did not relinquish all dominion over enemy property nor grant to enemy claimants a vested or property right therein by the Settlement of War Claims Act (Appellant's Point IV) was recently decided by the United States Supreme Court in *Woodson* v. *Deutsche Gold, etc., Vormals, supra.* In this case the Court, reaffirming its ruling in *United States* v. *Chemical Foundation,* 272 U. S. 1, 9–11, held that: "It is clear the enemy owners were *divested of every right in respect of property taken and held under the Act.*"

As stated by Mr. Justice Stone in *United States* v. *White Dental Mfg. Co.,* 274 U. S. 398, 402, in deciding a question concerning the ultimate return to a corporation of seized enemy property on the basis of the Trading with the Enemy Act:

> What would ultimately come back to it, as the event proved, might be secured *not as a matter of right,* but *as a matter either of grace* to the vanquished or exaction by the victor. (Italics supplied.)

The Settlement of War Claims Act of 1928, providing return of part of the enemy property was not a contract but an act looking to the bestowal of a gratuity and as such, it could be repealed. *Lynch* v. *United States, supra.*

Furthermore, it was conclusively indicated that the power of Congress over enemy property had not been relinquished by the Settlement of War Claims Act when the Supreme Court in the *Deutsche Gold Case, supra,* held that: "The Act of March 23, 1934, infringes no constitutional right of the respondent." By this Act (48 Stat. 510, Appendix D), which became law some six years *subsequent* to the Settlement of War Claims Act, Congress *reduced the return* to enemies from an amount equalling 80 per centum of the property less actual expenses chargeable against each trust, by an additional, flat 2 per centum deduction. The power of Congress over enemy property was again definitely exercised and its validity sustained as late as March of 1934.

Appellant urges (Point IV) that the authority for such deduction, made subsequent to the Settlement of War Claims Act, was valid only because of the original reservation in the Trading with the Enemy Act, as amended, with regard to the pay-

ment of expenses. As indicated by the *Deutsche Gold case,* Congress had early established the legislative policy that enemy property should bear the expense of its administration. The Act of March 23, 1934, merely carried out this policy. In like manner, by the Knox-Porter Peace Resolution of July 2, 1921, Congress established the legislative policy that no final disposition would be made of enemy property until Germany had made suitable provisions for the satisfaction of all American claims. Public Resolution 53, doing no more than that, precisely carries out this policy. As stated by the Court in *Sturchler* v. *Sutherland,* 19 F. (2d) 999 (1927):

> If one considers the history of the original act of 1917 and the subsequent amendatory acts from time to time, it will appear that, while the seizure started with the idea of taking away the property of the enemy to prevent them from giving support to their government during war time (*Miller* v. *Robertson,* 266 U. S. 243, 45 S. Ct. 73, 69 L. Ed. 265), this purpose changed until finally it is being repeatedly considered by Congress as a trust fund to be held as security for the settlement of claims of American citizens against the former enemy. See extract from debates in Congress, *infra.*
>
> There is no idea of confiscation, but there is this purpose of holding sufficient of the funds sequestered to meet American claims, provided same are not adjusted in some

other way, and this with the express agreement of the German and United States governments. *If this is so, surely it is for Congress to decide, from time to time, how this trust fund shall be diminished, rather than for the courts.*

* * * * *

The legislation of Congress, therefore, expresses a coherent, definite, and intentional plan. The various statutes have been enacted *cautiously,* and *with express limitation at all times, considering the importance of ownership at the time of seizure. There has been no waiver of any rights to the fund by this government.* On the contrary, it is a sequestered fund held for definite purpose by this government, *in contemplation of matters to be adjusted in times of peace rather than in times of war,* and with the full consent of both Germany and this country. (Italics supplied.)

The Settlement of War Claims Act was in no way a less cautious enactment than was the previous legislation of Congress concerning enemy property, in no manner dispensing with the fundametal status of ownership at the time of seizure, but merely by amendment, enlarging the return to German nationals from a maximum value of $10,000 to an amount equaling approximately 80 per centum of the seized property.

It is also urged that Public Resolution 53 involves an unlawful delegation of legislative powers to the President, and therefore that the Resolution

is ineffective to bar the appellant's action. It should be apparent, however, that this argument is entirely without merit because not only has there been no delegation of legislative powers, *Field* v. *Clark,* 143 U. S. 649 (1892); *Hampton* v. *United States,* 276 U. S. 394 (1928), but in addition it is to be noted that there has been no exercise by the President of any delegated powers as against this appellant. The removal of jurisdiction of which the appellant complains was a limitation imposed by Congress itself, and in no sense a restriction created by the President.

CONCLUSION

It is respectfully submitted that the decree of the Supreme Court of the District of Columbia sustaining the motion of defendants-appellees to dismiss the bill of complaint should be affirmed.

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APPENDIX A

PUBLIC RESOLUTION NO. 53, 73D CONGRESS

[48 Stat. 1267]

JOINT RESOLUTION To amend the Settlement of War Claims Act of 1928, as amended

Whereas the joint resolution of the Congress of the United States, approved July 2, 1921, provides in part as follows:

> SEC. 5. All property of the Imperial German Government, or its successor or successors, and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whatsoever, * * * shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government * * * shall have * * * made suitable provision for the satisfaction of all claims against said [Government] * * *, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents * * * since July 31, 1914, loss, damage, or injury

to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, * * *, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise * * *.

Whereas the treaty between the United States and Germany of August 25, 1921, incorporated said provision of such joint resolution and also provided in article I thereof as follows:

> Germany undertakes to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations, or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States; and

Whereas by the agreement of August 10, 1922, between Germany and the United States, a Mixed Claims Commission was established to adjudicate claims of American nationals against Germany arising out of the World War; and

Whereas under the terms of the debt-funding agreement between Germany and the United States dated June 23, 1930, Germany agreed to pay to the United States in satisfaction of Germany's obligations remaining on account of awards, including interest thereon, entered and to be entered by the Mixed Claims Commission, United States and Germany, the sum of 40,800,000

reichmarks for the period September 1, 1929, to March 31, 1930, and the sum of 40,800,000 reichmarks per annum from April 1, 1930, to March 31, 1981; and

Whereas Germany is now in arrears in payments due under said debt-funding agreement between Germany and the United States, and has accordingly failed to make suitable provision for the satisfaction of the said claims against Germany: Now therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That so long as Germany is in arrears in any payments of principal or interest, including interest at the rate of 5 per centum per annum on principal installments not paid when due, under the debt-funding agreement between Germany and the United States, dated June 23, 1930, with respect to Germany's obligations remaining on account of awards, including interest thereon, entered and to be entered by the Mixed Claims Commission, United States and Germany, all payments, conveyances, transfers, or deliveries of money or property or the income, issues, profits, and/or avails thereof authorized or directed to be made under the Trading with the Enemy Act, as amended, or the Settlement of War Claims Act of 1928, as amended, whether or not a judgment or decree has been entered with respect thereto, shall be postponed and the money or property, or the income, issues, profits, and/or avails thereof reserved: *Provided, however,* That such of the funds as are from time to time available (without taking into consideration interest thereafter accruing) under the Settlement

of War Claims Act of 1928, as amended, for the payment of principal and interest upon awards of said Mixed Claims Commission shall be applied when available to the payment of principal and interest upon such awards in the same manner and to the same extent as though certain of the payments provided for in said Act had not been postponed under this resolution: *Provided, further,* That the President may, in his sole discretion, remove the restriction as to any of the cases or classes of cases in relation to which payments, conveyances, transfers, or deliveries have been postponed under this resolution: *And provided further,* That the President is authorized to determine, for the purposes of this resolution, the period or periods in which Germany is in arrears in the payments hereinbefore described, and his determination thereof shall not be subject to judicial review.

APPENDIX B

The Trading with the Enemy Act of October 6, 1917, as amended (50 U. S. C. A. Appendix) provides *inter alia:*

> SEC. 9. (a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: Provided, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity

against the claimant to establish any right, title, or interest which he may have in such money or other property. *If the President shall not so order* within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

(b) In respect of all money or other property conveyed, transferred, assigned, delivered, or paid by the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, if the President shall determine that the owner thereof at the time such money or other property was required to be so conveyed, transferred assigned, delivered or paid to the Alien Property Custodian or at the time when it was voluntarily delivered to him or was seized by him was * * *

(c) Any person whose money or other property the President is authorized to return under the provisions of subsection (b) hereof may file notice of claim for the return of such money or other property, as provided in subsection (a) hereof, and thereafter may make application to the President for allowance of such claim and/or may institute suit in equity to recover such money or other property, *as provided in said subsection, and with like effect.* The President or the court, as the case may be, may make the same determinations with respect to citizenship and other relevant facts that the President is authorized to make under the provisions of subsection (b) hereof. (Italic supplied.)

APPENDIX C

Executive Order

SUPPLEMENTAL TO THE EXECUTIVE ORDER OF OCTOBER 12, 1917, VESTING POWER AND AUTHORITY IN DESIGNATED OFFICERS, AND MAKING RULES AND REGULATIONS UNDER THE "TRADING WITH THE ENEMY ACT"

By virtue of the power and authority vested in the President by "An Act to define, regulate, and punish trading with the enemy and for other purposes", known as the "Trading with the Enemy Act", approved October 6, 1917, and the amendments thereto, I hereby make the following orders, rules and regulations:

1. I hereby vest in the Alien Property Custodian all power and authority conferred upon the President by the provisions of Section 9 of the Act approved October 6, 1917, known as the "Trading with the Enemy Act", as amended by the various amendments thereto and by the "Settlement of War Claims Act of 1928", approved March 10, 1928, pertaining to the following classes of claims:

(a) Every claim in which the total amount to be returned does not exceed in money or other property the value of $10,000.

(b) Every claim where recovery may be had under paragraphs 15, 16, 17, 18, 19, 20, 21 and 22 of Subsection (b) of Section 9 of the Trading with the Enemy Act, as amended by the " Settlement of War Claims Act of 1928".

(c) Every claim of a German national where only 80 per cent of the principal is returnable, except as to claims under Subsections (d) and (g)

of Section 9 of the Trading with the Enemy Act, as amended.

(d) Every claim of a German national where the money or other property belonging to him and remaining in the possession of the Alien Property Custodian or the Treasurer of the United States, after deducting the sum of $10,000 returnable under the amendment to the Trading with the Enemy Act of March 4, 1923, is less than $2,000.

The Alien Property Custodian may refer any claim to the Attorney General for an opinion upon the law or facts upon which such claim is based.

2. I hereby vest in the Alien Property Custodian all power and authority conferred upon the President by Sections 20, 21 and 23 of the Act approved October 6, 1917, known as the " Trading with the Enemy Act ", as amended by the Act entitled "An Act to amend the Trading with the Enemy Act", approved March 4, 1923, and by the "Settlement of War Claims Act of 1928".

3. All claims for the return of unallocated interest shall continue to be paid under the regulations existing prior to the approval of the "Settlement of War Claims Act of 1928", pending the general allocation of such unallocated interest funds by the Alien Property Custodian.

4. All other Executive Orders heretofore made are hereby amended and modified to such extent as may be necessary to conform to the provisions hereof.

CALVIN COOLIDGE.

The WHITE HOUSE,
April 23, 1928.

No. 4862

APPENDIX D

INDEPENDENT ESTABLISHMENTS

[73d Congress. Sess. II, Ch. 102. March 28, 1934]

ALIEN PROPERTY CUSTODIAN

Subsection (a) of Section 24 of the Trading with the Enemy Act, as amended, is amended by adding at the end thereof the following:

> No claim shall be filed with the Alien Property Custodian or allowed by him or by the President of the United States, nor shall any suit be instituted or maintained against the Alien Property Custodian or the Treasurer of the United States, or the United States under any provisions of law, by any person who was an enemy or ally of enemy as defined in the Trading with the Enemy Act, as amended, and no allowance of any such claim now pending shall be made, nor judgment entered in any such suit heretofore or hereafter instituted, for the recovery of any deduction or deductions, heretofore or hereafter made by the Alien Property Custodian from money or properties, or income therefrom, held by him or by the Treasurer of the United States hereunder, for the general or administrative expenses of the office of the Alien Property Custodian, which deduction or deductions on the collection of any income do not exceed the sum of two per centum of such income or which on the return of any moneys or properties or income therefrom, do not exceed the sum of two per centum of the aggregate value thereof at the

time or times, as nearly as may be, of such deduction or deductions, or, for the recovery of any deduction or deductions heretofore or hereafter made by the Alien Property Custodian from money or properties or income therefrom held by him or by the Treasurer of the United States hereunder, for any and all necessary expenses incurred and actually disbursed by the Alien Property Custodian or by any depositary for him in securing the possession, collection, or control of any such money or properties or income therefrom, or in protecting or administering the same, as said general or administrative and other expenses and said aggregate value of returned money or properties or income therefrom have been heretofore or shall be hereafter determined by said Alien Property Custodian.

U. S. GOVERNMENT PRINTING OFFICE: 1935

DISTRICT OF COLUMBIA

FILED [illegible] - 1935

IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA

No. 6471

DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT,
Plaintiff-Appellant,

vs.

HOMER S. CUMMINGS, Attorney General of the United States, *et al.*,
Defendants-Respondents.

REPLY BRIEF FOR APPELLANT

THOMAS H. CREIGHTON, JR.,
ADNA R. JOHNSON, JR.,
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OTTO C. SOMMERICH,
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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT, *Plaintiff-Appellant,* *against* HOMER S. CUMMINGS, Attorney General of the U. S., et al., *Defendants-Respondents.*	No. 6471

REPLY BRIEF FOR APPELLANT.

The sole question involved on this appeal is the constitutionality of Public Resolution No. 53, 73rd Congress, an act of reprisal against Germany, by virtue of which our Government withholds from private owners, as a hostage for the indebtedness owing by the German Government, the return of about one per cent. of the seized property.

The main argument of Respondent (brief, pp. 1-14), is that the Court was without jurisdiction to entertain this question, and that by the Resolution, even though it is silent on this subject, Congress withdrew its consent to be sued theretofore given by the Settlement of War Claims Act. We shall discuss this question more in detail under the various points of argument.

FIRST

Respondent's Point I is plainly untenable.

It is effectively disposed of in Point XII of Appellant's brief (pp. 60-63.)

Moreover, respondent has evidently overlooked Section 17 of the Trading with the Enemy Act which expressly confers "jurisdiction" upon the District Courts "*to make and enter * * * all such orders and decrees and to issue such process as may be necessary or proper in the premises to enforce the provisions of this Act.*"

The Settlement of War Claims Act was an amendment to the Trading with the Enemy Act. Respondent concedes brief, (p. 7), that the President has ordered the return of the property to plaintiff. And Appellant's brief (pp. 24, 25) shows that the Settlement Act directs the making of the return.

The situation, therefore, is that the statutory direction to return the property has been disobeyed and, under Section 17, the lower Court had jurisdiction to enforce such direction as one of the "provisions of this Act".

The subsequent Resolution is a matter of defense. If it be unconstitutional, the law stands as it was prior to its enactment and a decree for plaintiff must ensue, from a Court fully endowed with jurisdiction.

There can, therefore, be no question of the jurisdiction of the lower Court.

The Settlement of War Claims Act involved more than a consent of the United States to be sued. It directed its officials to return the property to its admitted owners and empowers the Dis-

trict Courts to enforce the Act. And there is nothing in the Resolution by which the Government withdrew this consent to suit.

This fact appears, not only by the absence of any language to that effect, but by contrasting it with the law of March 28, 1934 (Appendix D, Respondents' Brief), relating to the same statute, which expressly withdrew such consent as to suits for administrative charges, the language being, "nor shall any suit be instituted or maintained" therefor.

Plainly, when Congress wished to withdraw consent to be sued under the Settlement of War Claims Act, it did so, in appropriate language. (See page 60 *et seq.* of Appellant's brief.) The 1934 Act thus shows plainly that the Settlement of War Claims Act conferred consent to be sued, and that the *only* instance in which this consent was withdrawn was as to administrative expenses. It follows that in all other instances such consent remains.

Respondent's comments upon *Commissioner* v. *Stearns* (p. 3 footnote), are plainly erroneous in describing it as a tax case "requiring strained concepts to support it". The case, as shown at pages 12, 13, Appellant's brief, turned entirely upon the question for which we cited it. And the very able Judge (Learned Hand) who wrote the opinion, is not given to strained concepts. Fair comment by respondent would seem to have required quotations of the language appearing at page 374 of the *Stearns* case showing that Congress never confiscated the property "except in small part" (evidently the 20%), and that it *was not* a case of confiscation "and a cession back of property of the United States," but merely a case where "the *power* to confiscate was *held in reserve,* but it *was not exercised.*"

This opinion was written with full knowledge of the cases cited at pages 3-6, Respondent's Brief, except *Woodson* v. *Deutsch Vormals*, 292 U. S. 453, 454 which, as stated at pages 30, 31 of Appellant's brief, shows that by the Settlement of War Claims Act, the only power reserved to the United States related to administrative expense.

It is indeed singular to refer, as respondent does, to the original *right* to confiscate, after the passage of the Settlement of War Claims Act, by which Congress definitely renounced that right as to the 80%. This is like citing authorities in support of a law, after the law itself has been repealed.

The argument at page 6, Respondent's Brief, derived from emphasizing the words "if the President shall not so order", fails to call attention to the language of Section 9 by which a claimant need not apply to the President at all, viz., "or, if the claimant shall have filed the notice as above required *and shall have made no application to the President, said claimant may institute a suit in equity.*"

In other words, a claimant may proceed directly to the Courts.

SECOND

Respondent's answer (pp. 30, 31) to Point VIII of Appellant's brief is patently unsound.

The Resolution was plainly a delegation of legislative powers. It authorized the President, upon his mere caprice, to render the Resolution inapplicable to any case or class of cases. It thus authorized him to render the Resolution nugatory in whole or in part—in fact to repeal it at his own uncontrollable will and frustrate the purpose and intent of Congress.

If the power to repeal is not a delegation of powers, we do not know what could be.

Nor do we appreciate how the failure to exercise any delegated powers can affect the validity of the Resolution. An unconstitutional law is not rendered valid by the failure to take action under it.

THIRD

Respondent's argument based upon the Debt Funding Agreement of 1930, is not only fallacious but depends upon warping the language out of its natural and only possible meaning.

At page 24 of Respondent's Brief he stresses the words "or hereafter" in such agreement as though they referred to a subsequent right to *seize* property. It is entirely plain, however, that they refer solely to any further *release* of property that the United States might see fit to make. And that is their only possible meaning. The language is that the United States shall not be required to "RELEASE" any German property then held "other than as heretofore or hereafter authorized by the Congress of the United States". In other words "or hereafter" refers to any further *release* that might hereafter be authorized, beyond the Settlement of War Claims Act which had been passed two years before, as was, of course, known to both parties to the agreement. Certainly it would be the height of absurdity to suggest that either party had in mind the repeal, wholly or partly, of that Act, under which the return of 80% had been in uninterrupted progress for two years.

Although the foregoing remarks are so clear as to require no argument in their support, the pro-

vision of the same agreement that the United States accepted *"as the only security"* for the fulfillment of the agreement, "the full faith and credit of Germany", shows conclusively that our argument is correct, as does the further part of the agreement which states that, because of the acceptance of such full faith and credit as the only security, Germany would be in the same position as other debtors of the United States, (see exact language, p. 54, Appellant's brief), whose citizens' property, of course, we do not dare to seize and would have no right to. As Germany's credit was to be the only security, the right of further seizure was necessarily excluded.

In face of these protestations of sole reliance upon Germany's faith, the defendant should not be allowed to try to warp this solemn agreement from its obvious meaning. That attempt is still more to be deplored when used in an effort to overthrow our national policy against confiscation which, as Judge Learned Hand says "would have violated international usage of at least one hundred years" (*Commissioner* v. *Stearns*, 65 F (2d), 371, 374).

Incidentally, it may be noted that *Sturchler* v. *Sutherland*, 19 Fed. (2d) 999, was reversed, 23 Fed. (2d) 414.

FOURTH

There is no doubt that under the Settlement of War Claims Act plaintiffs, after filing the consent to the temporary retention of the 20 per cent., became entitled as a vested right to the other 80 per cent. of its property, involved in this action.

The contrary contention of respondent is totally unfounded, as shown in appellant's brief.

Apart from the Statute itself, however, the entire historical setting in which it is found proclaims that, as to the 80%, vested rights were conferred upon its original owner.

After the Knox-Porter Resolution and the Treaty of Berlin had reserved the right of the United States to dispose of the seized property as it saw fit, it *did* so dispose of it by the Settlement Act—and, of course, it could not dispose of the same property twice.

That disposition as to the 80% was to direct immediate return to the former owners as the first step in fulfillment of the purpose stated in its title, namely: "the ultimate *return of* ***all*** property held by the Alien Property Custodian"—even the 20% being only "temporarily" retained—and then only upon the *written consent* of its owner.

Two years later—with the return of such 80% still in progress—comes the 1930 Debt Funding Agreement by which the United States solemnly declared that, as in the case of its other debtors, it would rely solely upon Germany's good faith for payment of its debt, but that the United States need not *"release"* any German property except as *"heretofore* or hereafter authorized by the Congress".

This was the clearest possible recognition that by the Settlement Act *"heretofore"* passed, the property ordered to be returned had been "released." It could have meant nothing else.

Still later, when the Act of March 28, 1934 ratified the deduction of administration expenses by the Custodian, it spoke of such deduction "on the *return* of any monies or properties or income therefrom" and "said aggregate value of *returned* monies or properties or income therefrom had been heretofore *or shall be hereafter determined* by the Alien

Property Custodian" (Appendix D of Respondent's Brief).

And, of course, if the slightest vestige of ownership had remained in the United States, it would have been absurd to pass a law allowing its Custodian to charge for administration expenses upon the *return* of that property.

A brief reference to the Settlement Act itself, aside from its title, shows numerous provisions consistent only with a revesting of title in the original owner. Among these are:

(a) Requirement of consent to the temporary retention of 20% (subdivision (m) of Section 9). None but the owner could so consent.

(b) Authorization to the Custodian to withdraw outstanding demands for enemy property upon receiving 20% thereof (Sections 29(a), 29(b), thus relinquishing *even the seizure* of the 80%.

(c) The payment of taxes upon seized property *"as though" it "had not been seized"*. (Section 24.) So it was regarded as a cancellation of even the seizure. And the taxes could not be paid to the United States if any of the property still belonged to it.

(d) References to the former enemy as the person *"entitled"* thereto (subdivisions m. and p. of Section 9; Section 25(e), subdivision 2; Section 26(b), subsections (d), (g), (j) of Section 9).

(e) That the enemy may receive its entire property if, to avoid a sale thereof, he pays 20% to the Custodian (subsection m. of Section 9). *To permit him to pay 20% without giving him the property would constitute a positive fraud by the United States.*

(f) Even the full income from March 4, 1923 was directed to be paid the former enemy

> out of property "held in trust for such person" (Section 23), as well as his proportion of the unallocated Treasury interest (Sections 26a, b, c).

How, under the foregoing circumstances, it can even be suggested that there was no vested right to the 80%, passes comprehension.

It must be recalled that when the Settlement of War Claims Act was under consideration, the report of the Senate Committee on Finance, 70th Congress, 1st Session, Report No. 273 in connection with the Settlement of War Claims Act, said:

> "The bill provides for the *immediate* return of 80 per cent. of the property now held by the Alien Property Custodian. This percentage was reached in the **agreement* above referred to and the parties affected are satisfied with it."

The word "immediate" is very important.

Clearly, it was the intention of Congress that there was to be no delay in the return of the property. It was a recognition by Congress of the very rights referred to on page 21 of the Government's Brief, where the Government said:

> "The Act * * * did not effect a confiscation in the sense that the United States had definitely appropriated the property to its own use."

The Settlement of War Claims Act, therefore, was an immediate appropriation to the original owners of their own property.

---

* This is the agreement referred to on page 36 *et seq.* of our previous brief.

FIFTH

The decree appealed from should be reversed and the motion to dismiss the complaint should be denied and judgment directed in favor of the plaintiff-appellant.

Respectfully submitted,

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THOMAS H. CREIGHTON, JR.,
JAMES J. LENIHAN,
Of Counsel.

UNITED STATES
COURT OF APPEALS FOR
DISTRICT OF COLUMBIA

FEB 11 1935

In The

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 6471.

Deutsche Bank und Disconto-Gesellschaft, a Corporation, *Appellant*,

v.

Homer S. Cummings, Attorney General of the United States, and W. A. Julian, as Treasurer of the United States, *Appellees*.

REPLY OF APPELLEES TO REPLY BRIEF OF APPELLANT.

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FREA PRINTING COMPANY, WASHINGTON, D. C.

In The

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REPLY OF APPELLEES TO REPLY BRIEF OF APPELLANT.

I.

The Appellant Misconceives the Nature of the Single Question Before the Court.

The appellant in its reply brief states that Public Resolution 53 "is a matter of defense" and that "if it be unconstitutional * * * a decree for the plaintiff must ensue." *This statement entirely misconceives*

the nature of the action and the particular problem before this court. The Government in final analysis *does not* urge Public Resolution 53 *as a defense* in the technical sense. Although the constitutional power of Congress to postpone payments to German nationals was discussed in oral argument, and commented upon in the latter part of the Government's brief, it must be noted that the primary problem before this court is a problem of jurisdiction which has a three-fold aspect. (1) Did Congress, by Public Resolution 53, remove the consent of the United States to be sued; (2) Does Congress have the power to remove the consent of the United States to be sued; and (3) Disregarding Public Resolution 53, did the lower court have jurisdiction to entertain this suit by this appellant? It is submitted that an affirmative answer should be given both to interrogatory No. 1 as well as to interrogatory No. 2, which was conceded by the appellant upon oral argument, and as to interrogatory No. 3 it is urged that even in the absence of Public Resolution 53 the lower court was nevertheless without jurisdiction.

If this Court should answer question No. 1 in the negative it must be for the reason that Congress by Public Resolution 53 did not effectively remove the lower court's jurisdiction to entertain a suit against the United States, and not because Congress did not have the constitutional power to do so. A conclusion that the jurisdiction of the lower court was not removed would result in the peculiar situation wherein Congress on the one hand confers jurisdiction upon a court, and on the other hand directs that that court's judgments should not be complied with. Such a conclusion has, of course, been frowned upon by the courts. *District of Columbia* v. *Iselin,* 183 U. S. 62.

But even assuming that such an anomalous situation exists, it appears that as to this particular appellant, the lower court, for another reason, is without jurisdiction. The Government's argument I-B on page 6, 7 of its brief clearly shows that the Trading with the Enemy Act does not authorize a suit by a claimant, after the President has ordered the return of the very property which the claimant seeks. The appellant in its reply brief (p. 4) states that the Government failed to call attention to that language of Section 9 in which it is provided that if the claimant "shall have made no application to the President, said claimant may institute a suit in equity." We are happy that the appellant has stressed this clause, and we agree that it should be printed in italics, for the appellant has thereby impeached its own cause. Paragraph 9 of the appellant's bill of complaint (transcript p. 3) provides:

> "That prior to the 16th day of February, 1933, * * * *the plaintiff* * * * *made application to the President of the United States* for the return to it of said property." (Italics supplied.)

Where the President has ordered the return of the property sought, and it is not forthcoming, the appellant's remedy is perhaps to seek a writ of mandamus, and then it is entirely likely that the Government would urge Public Resolution 53 *as a defense* in the technical sense. This, indeed, is actually what occurred in *Kaffee Handels Aktiengesellschaft* v. *Homer S. Cummings et al.* (Supreme Court of the District of Columbia, At Law No. 84993), where the Supreme Court held that Public Resolution 53 constituted a complete defense. It is also worthy of note that in that case the attorney for the relator, who is also one of the attor-

neys for the appellant in this case, argued that mandamus was its only remedy because the court had no jurisdiction under Section 9 of the Trading with the Enemy Act for the dual reason (1) The relator's right, title and interest in the property had already been determined by administrative action, and (2) The President had ordered the return of the property. This is now the argument made for the Government in this case. If the appellant should seek a writ of mandamus, it is then, and only then, that the question of the constitutionality of the Resolution would properly be a subject for examination. It is believed, of course, that when the problem is thus properly raised its constitutionality and effectiveness as to this appellant will be sustained not only upon the ground that no vested rights were conferred, and upon the ground that because of the appellant's enemy status it cannot invoke the protection of the Fifth Amendment, but also upon the ground that, as a German national, it is precluded by the Treaty of Berlin from questioning the validity of the detention required by Public Resolution 53.

II.

Public Resolution 53 Does Not Involve an Unlawful Delegation of Legislative Powers.

In the Government's brief it was noted that as to this appellant there has been no exercise by the President of any delegated powers (p. 31). The appellant, however, cannot "appreciate" the validity of this argument, and asserts that the mere existence of the power to suspend an act makes the act unconstitutional, and apparently the act is thereby automatically suspended. This is an untenable conclusion.

But the appellant is further in error in assuming that Congress cannot confer the power to suspend an act based upon a contingency to be ascertained by the President. In *Field* v. *Clark*, 143 U. S. 649, the court commented on the case of *The Brig Aurora*, 7 Cranch 382, and said:

> "This certainly is a decision that it was competent for Congress to make the revival of an Act depend upon the proclamation of the President, showing the ascertainment by him of the fact that the edicts of certain nations had been so revoked or modified that they did not violate the neutral commerce of the United States. *The same principle would apply in the case of the suspension of an Act upon a contingency to be ascertained by the President, and made known by his proclamation.*" (Italics supplied.)

A reading of the resolution itself and the report of the Senate Committee (Appendix I) must inevitably lead to the conclusion that Congress did no more than to authorize a suspension of the provisions of Public Resolution 53, upon a finding of *fact* by the President. No standard is needed to guide the President in his finding of the fact of continued default, or of payment by Germany. The recitals of Public Resolution 53, as well as its legislative history, show that the Congress empowered the President to remove the restrictions as to the many classes of claimants enumerated in Section 9 of the Act who are not German nationals. This the President has done by Executive Order 6981 of March 2, 1935, and Executive Order 7111 of July 22, 1935. The restrictions now effective are those against the return of property to German nationals and German corporations.

Report 1376 of the Senate Committee on Finance, 73rd Congress, 2nd Session, on S. J. Res. 135, which became Public Resolution No. 53, is copied herein as Appendix I.

Executive Orders 6981 and 7111 are also appended as Appendices II and III.

Respectfully submitted,

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APPENDIX I.

73D CONGRESS } SENATE { REPORT
2d Session } { No. 1376

TO AMEND SETTLEMENT OF WAR CLAIMS ACT OF 1928, AS AMENDED

JUNE 6 (calendar day, JUNE 11), 1934.—Ordered to be printed

Mr. HARRISON, from the Committee on Finance, submitted the following

REPORT

[To accompany S.J.Res. 135]

The Committee on Finance, to whom was referred the joint resolution (S.J.Res. 135) to amend the Settlement of War Claims Act of 1928, as amended, having considered the same, report favorably thereon with amendments, and recommend that the resolution, as amended, do pass.

Following the war, German nationals had claims against the United States such as claims arising from our seizure of property owned by German nationals. Similarly, American nationals had claims against the German Government arising out of the war. On July 2, 1921, Congress passed the Knox-Porter Peace Resolution (later incorporated in the Peace Treaty between the United States and Germany) which provided that none of the property of the German Government and German nationals which was seized during the war should be returned until Germany had made suitable provision for the satisfaction of the claims of the

United States and its nationals against Germany arising out of the war.

Germany was not in a position to make a lump payment of the amount due to Americans. Accordingly, the United States consented to the German-American Debt Agreement (June 23, 1930) under which Germany agreed (among other things) to make payment in installments over a period of years of an aggregate amount equal to the estimated amount due to American nationals. The installments were not sufficiently large to permit of early payments in substantial amounts. Accordingly, the American Congress appropriated $86,000,000 to be deposited in an account known as the "German Special Deposit Account", out of which payments were to be made in accordance with priorities established in the Settlement of War Claims Act of March 10, 1928. Of this $86,000,000 approximately $43,000,000 was paid to American nationals and $43,000,000 to German nationals.

The German Government took advantage of the provisions of the German-American debt agreement permitting postponement of its principal installment payments for a period not exceeding 2½ years. On March 31 of this year both the postponed installments and the installment due on that date became payable, but were not paid. The German Government did, however, make payment of interest as required by the agreement until last September, when, instead of making the interest payment to the United States, it notified the United States that it had established a credit in marks in a German bank corresponding to the interest due. On March 31 of this year Germany made payment in dollars in the United States of the current interest due; but as previously stated, failed to make payment of the principal installments due. Furthermore, the German Government has failed to make satisfactory assurances as to when those installments will be paid.

The result is that while the United States has fulfilled its undertakings, Germany has failed to make suitable provision for the satisfaction of the claims of the United States and its nationals called for in the

Knox-Porter peace resolution. Under these circumstances it would appear to be in accord with the policy of the Congress as declared in that resolution to postpone any further liquidation of the claims of German nationals against the United States until the German Government fulfills its undertakings to provide for satisfaction of the claims of American nationals against it. The resolution reported is designed to carry out this policy.

The foregoing is stated in very general terms for the reason that it would be difficult to present in brief form a picture of the whole question of the war claims were an attempt made, at the same time, to set out the details and the necessary qualifications covering variations not essential to the point at issue.

A detailed statement of the situation, together with an explanation of amendments similar to those agreed to by your committee, and which are clarifying in character, is contained in the report (appended herewith) of the House Committee on Ways and Means upon a companion resolution, House Joint Resolution 365.

[H.Rept. No. 1924, 73d Cong., 2d sess.]

The Committee on Ways and Means, to whom was referred the joint resolution (H.J.Res. 365) to amend the Settlement of War Claims Act of 1928, as amended, having had the same under consideration, report it back to the House with amendments and recommend that the joint resolution as amended do pass.

The amendments are as follows:

On page 3, line 11, strike out "any or".

On page 4, line 14, after "postponed" insert "under this resolution".

On page 4 strike out in lines 15 to 18, inclusive, the following: "the action of the President in determining the period or periods in which Germany is in arrears in the payments hereinbefore described shall not be subject to judicial review" and insert in lieu thereof

"the President is authorized to determine, for the purposes of this resolution, the period or periods in which Germany is in arrears in the payments hereinbefore described and his determination thereof shall not be subject to judicial review".

The purpose of this resolution is to postpone (*a*) further payments to German nationals from the German special deposit account in the Treasury Department, established under section 4 of the Settlement of War Claims Act of 1928, on account of awards made by the War Claims Arbiter for ships, patents, and a radio station seized and used by this Government during the war, and (*b*) further return of property belonging to German nationals held by the Alien Property Custodian, while Germany is in arrears on her payments on claims of American nationals under the debt agreement of June 23, 1930.

By the terms of the settlement of War Claims Act, the awards in favor of German nationals for ships, patents, and a radio station, and the awards entered by the Mixed Claims Commission against Germany in favor of American nationals were to be paid in accordance with the scheme of priorities established in section 4 (c) of the act.

Germany is now in arrears on the payments due under the debt agreement of June 23, 1930, and there is no assurance when those arrears will be discharged or further annual payments made. It is not felt that this Government should make further payments to German nationals from the limited funds that may be available in the German special-deposit account, or that it should return the small amount of property still held by the Alien Property Custodian while Germany's obligations under the debt agreement remain in their present state.

The resolution withholds all amounts which may become payable to German nationals under the Settlement of War Claims Act of 1928 and withholds the return of all property belonging to German nationals now held by the Alien Property Custodian under the Trading with the Enemy Act as amended. In view of the many complicated matters involved it is believed

that a review of the problems before Congress at the time it passed the Settlement of War Claims Act and a review of subsequent events may be useful to the Members of the House.

The Settlement of War Claims Act of 1928 was approved March 10, 1928. The act is complicated by reason of the innumerable complex situations covered by it and also by the complexities of the Trading with the Enemy Act, which was amended in several particulars by the Settlement of War Claims Act.

There were three major problems involving the United States and its nationals and the German Government and its nationals arising out of the war which the act attempted to settle. In order not to unduly complicate the matter, similar problems involving the United States and its nationals in their relation to the Austrian and Hungarian Governments and their nationals, also covered in the act, are not covered in this report. The three major problems referred to were as follows:

1. *Alien property.*—Property of German nationals in the United States was seized during the war by the Alien Property Custodian under the provisions of the Trading with the Enemy Act, as amended, and a large part, estimated at a value of over $200,000,000, was being held at the time of the enactment of the Settlement of War Claims Act with no authority in the Executive to return it. Under the Knox-Porter peace resolution of July 2, 1921, quoted in part in the first paragraph of the preamble of House Joint Resolution 365 and which was incorporated in full in the Treaty of Berlin, the United States unquestionably possessed the right to retain this property until Germany had made suitable provision for the satisfaction of the claims of American nationals against the German Government. Congress in the Settlement of War Claims Act authorized the return of 80 percent of the aggregate value of the property of German nationals so held, and further authorized that the remaining 20 percent of the aggregate value of such property be retained and invested in 5 percent certificates which participate under certain

conditions and in a certain order of priority in the funds in the German special deposit account in the Treasury created by the Settlement of War Claims Act.

2. *Mixed claims.*—The United States Government and many American nationals suffered losses during the war period by reason of acts for which the German Government was responsible, and their claims had to be satisfied. A commission, known as the "Mixed Claims Commission, United States and Germany", was created by the agreement of August 10, 1922, to hear and determine the claims and to enter awards for the losses for which Germany was responsible. Through arrangements made by the Secretary of State with the Allied Governments, there had been allocated to the United States under the provisions of the Finance Ministers' agreement of January 14, 1925, 2¼ percent of all receipts paid by Germany which were available for reparation payments, with a proviso that the sum so allocated should not exceed 45,000,000 gold marks in any one year. The United States was, therefore, receiving at the time of the enactment of the Settlement of War Claims Act approximately $11,000,000 per annum through the Reparation Commission for account of Germany's obligations.

By passing the Settlement of War Claims Act, Congress in effect recognized that arrangements had been made which if fulfilled constituted a "suitable provision for the satisfaction of all claims" against Germany required by the joint resolution of July 2, 1921. By the debt agreement of June 23, 1930, an arrangement was made directly with Germany which superseded the previously mentioned arrangement and provided for the gradual liquidation of the Mixed Claims awards through the payment of an annual sum of 40,800,000 reichsmarks ($9,700,000) for a period of 52 years, in semiannual installments of 20,400,000 reichsmarks each. Congress approved this agreement. But if the American claimants had been forced to rely upon only the distributive share in the payments to be made under the two arrangements mentioned, more than 70

years would have been required for payment in full. It was necessary, therefore, that some method be provided by which the American claimants could obtain a more immediate payment.

3. *Awards of War Claims Arbiter in favor of German nationals.*—The United States Government, under the authority of a joint resolution of Congress, during the war seized and took title to a large number of ships owned by citizens of Germany and acquired for its own use during the war a large number of patents and a radio station. The United States recognized a duty to make compensation on these accounts to the German nationals for the value of their property so taken and used. The Settlement of War Claims Act created the office of War Claims Arbiter and authorized the Arbiter to hear the claims of the German nationals and to determine the fair compensation to be paid by the United States. Some provision had to be made for the payment of the amounts determined to be due.

The Settlement of War Claims Act recognized the close relationship between the three problems and their solution as a whole. Under the circumstances, it was not possible to provide for the immediate payment of all American claimants, nor the immediate payment of all owners of the ships, patents, and the radio station, nor the immediate return of all the alien property. The act did, however, provide for the immediate payment of as large a percentage as possible of the claims of the American nationals and the German nationals, and for the return of as large a percentage as possible of the alien property, with a provision for the payment of the balance due over a period of years.

The act created in the Treasury a German special deposit account into which the Secretary of the Treasury was directed to deposit the following funds:

(*a*) All sums invested by the Alien Property Custodian under the provisions of section 25 (a) of the Trading with the Enemy Act, as amended, which represents 20 per cent of the aggregate value of the property of German nationals temporarily retained by the

Alien Property Custodian. As the funds are invested as required by the Trading with the Enemy Act and deposited in the German special deposit account, the Secretary of the Treasury issues to the Alien Property Custodian a 5 per cent participating certificate, which is payable in accordance with the priorities hereinafter enumerated.

(*b*) All sums transferred by the Alien Property Custodian under the provisions of section 25 (b) of the Trading with the Enemy Act, as amended, which was referred to as the "Unallocated interest fund" and which represented the interest accrued prior to March 4, 1923, on investments of funds of the Alien Property Custodian, plus interest on the investment of such interest after March 4, 1923. No authority of law exists for distributing any interest accruing on the investment of the funds prior to March 4, 1923, the date of the approval of the Winslow Act, which act authorized the return of not to exceed $10,000 per annum to any one person, of the income accruing after that date.

(*c*) Amounts appropriated by Congress for the payment of awards of the War Claims Arbiter in favor of German nationals for ships, patents, and a radio station.

(*d*) All moneys received from Germany on account of the awards of the Mixed Claims Commission in favor of American nationals.

(*e*) Earnings on investments of funds in the deposit account.

The act authorized and directed the Secretary of the Treasury to make payments out of the German special deposit account in the following order of priority:

(1) Payment of expenses of administration.

(2) Payment in full of awards in favor of American nationals attributable to death and personal injury, together with interest thereon up to the date of payment.

(3) Payment in full of awards in favor of American nationals, the amount of which, including interest to January 1, 1928, does not exceed $100,000, together with interest on such amount from January 1, 1928, to the date of payment.

(4) Payment of $100,000 on account of awards in favor of an American national, the amount of which, including accrued interest to January 1, 1928, is in excess of $100,000, provided no person shall be paid an amount in excess of $100,000 under this priority, irrespective of the number of awards made in his behalf.

(5) Additional payments on awards in excess of $100,000, including interest to January 1, 1928, entered in favor of American nationals, as and when funds are available for this purpose as determined by the Secretary of the Treasury, until the aggregate payments authorized by priorities 2 to 5 equal 80 percent of the aggregate amount of the awards entered, including interest to January 1, 1928.

It is pointed out that all the payments authorized by paragraphs 2, 3, and 4 above have been practically completed. There are a few cases remaining unpaid because the claimants cannot be located and for other reasons, but funds have been reserved for their complete payment. As to paragraph 5, payments have been made which aggregate about 74½ percent of the amount authorized to be paid under these priorities. There remains, therefore, approximately 5½ percent (about $2,000,000) to complete this priority to American nationals.

(6) Payment to German nationals of 50 percent of the awards entered by the War Claims Arbiter for ships, patents, and a radio station, including interest to December 31, 1928. The Secretary of the Treasury was authorized to pay this amount without regard to any of the other priorities.

(7) Payment of accrued interest upon the 5-percent participating certificates evidencing the amounts invested by the Alien Property Custodian.

(8) Payment of accrued interest since January 1, 1928, on awards of the Mixed Claims Commission in excess of $100,000 in amount, including accrued interest to January 1, 1928, in favor of American nationals and accrued interest since December 31, 1928, on awards of the War Claims Arbiter in favor of German nationals

for ships, patents, and a radio station, including accrued interest to December 31, 1928.

(9) Pro-rata payments, to the extent funds are available, (*a*) to the Alien Property Custodian on the 5 percent participating certificates held by him as evidence of the investment of funds representing 20 percent of German property temporarily retained; (*b*) to German nationals on account of the balance due on their awards entered by the War Claims Arbiter for ships, patents, and a radio station, including interest to December 31, 1928; and (*c*) to American nationals on account of the balance due on awards in excess of $100,000 in amount, including interest to January 1, 1928, entered by the Mixed Claims Commission.

(10) Payment to German nationals on account of the "Unallocated interest fund." No interest accrues on this sum.

(11) Payment to the United States Government on account of awards entered in its behalf by the Mixed Claims Commission, together with interest on such awards.

The Trading with the Enemy Act, as amended by the Settlement of War Claims Act, authorized the return of 80 percent of the aggregate value of the property of German nationals, as determined by the Alien Property Custodian; authorized the temporary retention of the remaining 20 percent; and authorized that funds equal to the value of such property so retained be paid to the German nationals from the German special deposit account in the order of priority established by the Settlement of War Claims Act.

The following is a statement showing the amounts of the various classes of claims, the payments made on account of each class, and the balance due as of March 31, 1934:

I. Principal of awards of Mixed Claims Commission	$128,500,000

Interest to Jan. 1, 1928..	40,500,000	
Amount due Jan. 1, 1928	169,000,000	
Payments made on account	134,000,000	
	35,000,000	
Interest accrued at 5 percent per annum, from Jan. 1, 1928, to Mar. 31, 1934.....	19,000,000	
Balance due as of Mar. 31, 1934.....		$54,000,000
II. Principal of awards of War Claims Arbiter...	63,200,000	
Interest to Dec. 31, 1928	23,500,000	
Amount due Dec. 31, 1928	86,700,000	
Payments made on account	43,400,000	
	43,300,000	
Interest accrued at 5 percent per annum, from Dec. 31, 1928, to Mar. 31, 1934.....	16,100,000	
Balance due as of Mar. 31, 1934.....		$59,400,000
III. Twenty percent of German property temporarily retained:		
Investment by Alien Property Custodian	17,550,000	
Investment yet to be made by Alien Prop-		

erty Custodian ($15,500,000).		
Interest accrued on investment to Mar. 31, 1934	3,600,000	
Balance due as of Mar. 31, 1934		21,150,000
IV. Unallocated interest fund		21,750,000
Amount due private claimants from German special deposit account as of Mar. 31, 1934		156,300,000
V. Principal of awards entered in behalf of the United States Government	42,035,000	
Interest to Mar. 31, 1934	38,300,000	
		80,335,000
Total including accrued interest		236,635,000

In addition it is understood that the Alien Property Custodian has property in his hands valued at approximately $10,000,000, of which 80 or 90 percent is estimated to belong to German nationals. Under the law as it now stands, 80 percent of this property would probably be returned this calendar year, the remaining 20 percent to be retained for deposit in the German special-deposit account.

The following shows the funds made, or to be made, available to the German special-deposit account and the payments that have been made out of such account:

Receipts:

From investments of Alien Property Custodian under Trading with the Enemy Act, as amended:	
Unallocated interest fund	$21,750,000

20 percent German property retained	17,550,000	
Total		$39,300,000
From Germany:		
2¼ percent of receipts as authorized by Finance Ministers' agreement of Jan. 14, 1925	32,183,000	
Under debt agreement of June 23, 1930	20,198,000	
Total		52,381,000
Appropriation made by Congress for ships, patents, and radio station (awards for War Claims Arbiter)		86,852,000
Earnings and profits on investments		4,181,000
Total receipts		182,714,000
Payments:		
On account of awards of the Mixed Claims Commission	$134,000,000	
On account of awards of the War Claims Arbiter	43,368,000	
Miscellaneous payments (expenses, etc.)	817,000	
Total		$178,185,000
Balance in German special-deposit account		4,529,000
Funds in hands of Alien Property Custodian available for deposit in German special-deposit account		15,500,000
Total available to German special-deposit account		20,029,000

It will be noted that the funds now available to the German special deposit account amount to about $20,000,000, which are being reserved to make payment on account of any awards which the Mixed Claims Commission might enter on the claims now pending before it. In case awards are entered on account of the claims now pending before the Commission, payments will be made in the same manner and to the same extent as payments have already been made on account of awards entered and certified for payment. On the other hand, if the claims pending before the Commission are disallowed, the $20,000,000 held in reserve will be released and distributed to American and German Nationals in accordance with priorities specified in section 4 (c) of the Settlement of War Claims Act, hereinabove enumerated. In such case the funds made available, together with 80 percent of the value of the property in the hands of the Alien Property Custodian estimated at $6,500,000, or a total of $26,500,000, would be distributed approximately as follows:

To American nationals:		
Balance of 80 percent of awards of Mixed Claims Commission under priority no. 5 (5½ percent remaining unpaid)	$2,000,000	
On account of interest accrued since Jan. 1, 1928 (approximately 40 percent of such interest)	7,800,000	
Total to American nationals		$9,800,000
To German nationals:		
Interest on 5-percent participating certificates (20 percent of German property temporarily retained)	3,600,000	
On account of interest accrued since Dec. 31, 1928, on awards of War Claims		

Arbiter (approximately 40 percent of such interest)..	6,600,000	
Return of property in hands of Alien Property Custodian	6,500,000	
Total to German nationals.....		16,700,000
Total available for distribution.....		26,500,000

Under the debt agreement of June 23, 1930, the German Government is obligated to pay semiannually to the United States for a period of 52 years on account of the awards of the Mixed Claims Commission, the sum of 20,400,000 reichsmarks ($4,850,000 at the time the agreement was concluded, or about $8,150,000 at the present mint parity of the mark). Under the debt agreement that Government has the option of postponing payment of the installments due for a period of 2½ years, but the amounts so postponed bear interest at the rate of 5 percent per annum, payable semiannually.

The Hoover moratorium was declared in June, 1931, and covered payments falling due during the year July 1, 1931, to June 30, 1932. It excepted private obligations, and the joint resolution of December 23, 1931, authorizing that moratorium, treated the payments due on account of mixed claims as falling under the exception. Germany, however, took advantage of the option in the agreement to postpone the payments due, and has exercised that option ever since up to and including the payment due September 30, 1933. It paid the interest semiannually up to March 31, 1933, but the semiannual payment of interest due on September 30, 1933, was paid in reichsmarks into an account in Germany and was not transferred to the United States, as required by the terms of the debt agreement. It is understood that the United States advised the German Government that it could not accept the payment in reichsmarks as a compliance with the debt agreement.

On March 31, 1934, all of the installments aggregating 102,000,000 reichsmarks, previously postponed since September 30, 1931, together with the semiannual installment of 20,400,000 reichsmarks and semiannual interest of 2,550,000 reichsmarks, or a total of 122,400,000 reichsmarks (about $50,000,000), were due and payable. Germany advised that it could not meet the principal payments falling due, but would and did pay the interest due of 2,550,000 reichsmarks (about $1,000,000).

The Treasury holds German bonds for account of mixed claims in the face amount of 2,040,000,000 reichsmarks ($500,000,000 at time of acquisition but $800,000,000 at present rates).

The debt agreement of June 23, 1930, provides that the obligation of Germany to make the payments specified therein shall cease as soon as all of the payments contemplated by the Settlement of War Claims Act of 1928 have been completed and the bonds of Germany held by the United States not then matured shall be canceled and returned to Germany.

The amendment to the joint resolution striking out "any or" and the amendment inserting "under this resolution" are clerical clarifying amendments. The amendment to the last proviso specifically empowers the President to determine the period or periods in which Germany is in arrears on her payments and retains the substance of the provision stricken out so that judicial review of the President's determination is denied.

APPENDIX II.

REMOVING, IN CERTAIN CASES, RESTRICTIONS IMPOSED BY PUBLIC RESOLUTION 53, OF JUNE 27, 1934, AS TO PAYMENTS, TRANSFERS, AND DELIVERIES OF PROPERTY UNDER THE TRADING WITH THE ENEMY ACT AND THE SETTLEMENT OF WAR CLAIMS ACT OF 1928.

By virtue of and pursuant to the authority vested in me by Public Resolution 53, approved June 27, 1934 (48 Stat. 1267), the Trading with the Enemy Act, approved October 6, 1917 (40 Stat. 411), as amended, and the Settlement of War Claims Act of 1928, approved March 10, 1928 (45 Stat. 254), I do hereby order as follows:

Section 1. For the purposes of the said resolution, it is hereby determined that Germany has been and is now in arrears in payments of principal and interest under the debt-funding agreement between Germany and the United States dated June 23, 1930, with respect to the obligations of Germany on account of awards entered and to be entered by the Mixed Claims Commission, United States and Germany. The period in which Germany is in arrears shall be deemed to continue for the purposes of this order until it is determined by the President that such period has terminated.

Section 2. The restrictions imposed by the said resolution are hereby removed except as to the following payments, conveyances, transfers, or deliveries of money or property or of the income, issues, profits, or avails thereof:

1. To any person who was on April 6, 1917, or who at any time since that date has been, a German national, unless such person is entitled to receive payment under section 9, subsection (b) (1), of the Trading with the Enemy Act, as amended, or unless such person is a national of the United States at the time of payment, conveyance, transfer or delivery, and was on June 1, 1934, the legal and beneficial owner of the claim to the money or property or the income, issues,

profits, or avails thereof, and on or before June 1, 1934, the United States received written notice of such ownership.

2. To any person domiciled or resident within the territory of Germany, except a natural person who is a national of the United States at the time of payment, conveyance, transfer, or delivery.

3. To any corporation, association, or partnership, or other unincorporated body of individuals or a body politic which on or at any time since April 6, 1917, was organized or existed under the laws of Germany or had its principal place of business in Germany.

4. To any corporation, association, or partnership, or other unincorporated body of individuals, or a body politic in which a substantial legal or beneficial interest is owned directly or indirectly by any person to whom payment, conveyance, transfer, or delivery continues to be postponed under subdivision 1, 2, or 3 hereof, or to any person who is a trustee of such money or property for a person to whom payment, conveyance, transfer, or delivery continues to be postponed under subdivision 1, 2, or 3 hereof.

5. To the heirs, devisees, legatees, executors, administrators, representatives, creditors, successors, or assigns of any person to whom payment, conveyance, transfer, or delivery continues to be postponed under subdivision 1, 2, 3, or 4 hereof, except to such heirs, devisees, or legatees as are natural persons and have been nationals of the United States from June 1, 1934, to the time of payment, conveyance, transfer, or delivery.

Section 3. For the purposes of this Executive order, (*a*) the nationality, residence, domicile, or other qualification of claimants under the Trading with the Enemy Act, as amended, shall be that determined by the Attorney General; and (*b*) the nationality, residence, domicile, or other qualification of claimants to money or property or the income, issues, profits, or avails thereof held in the German Special Deposit Account, and in the Austrian and Hungarian Special Deposit

Accounts, shall be that determined by the Secretary of the Treasury.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
March 2, 1935.

[No. 6981.]

APPENDIX III.

AMENDMENT OF EXECUTIVE ORDER No. 6981, OF MARCH 2, 1935.

Section 2 of Executive Order No. 6981, of March 2, 1935, removing, in certain cases, restrictions imposed by Public Resolution 53, of June 27, 1934 (48 Stat. 1267), as to payments, transfers, and deliveries of property under the Trading with the Enemy Act (40 Stat. 411) and the Settlement of War Claims Act of 1928 (45 Stat. 254), is hereby amended to read as follows:

"Section 2. The restrictions imposed by the said resolution are hereby removed except as to the following payments, conveyances, transfers, or deliveries of money or property or of the income, issues, profits, or avails thereof:

1. To any person who was on April 6, 1917, or who at any time since that date has been, a German national, unless such person is entitled to receive payment under section 9, subsection (b) (1), of the Trading with the Enemy Act, as amended, or unless such person is a national of the United States at the time of payment, conveyance, transfer, or delivery, and was on June 1, 1934, the legal and beneficial owner of the claim to the money or property or the income, issues, profits, or avails thereof, and on or before June 1, 1934, the United States received written notice of such ownership.

2. To any corporation, association, or partnership, or other unincorporated body of individuals, or a body politic which on or at any time since April 6, 1917, was organized or existed under the laws of Germany or had its principal place of business in Germany.

3. To any corporation, association, or partnership, or other unincorporated body of individuals, or a body politic in which a substantial legal or beneficial interest is owned directly or indirectly by any person to whom payment, conveyance, transfer, or delivery continues to be postponed under subdivision 1 or 2 hereof, or to

any person who is a trustee of such money or property for a person to whom payment, conveyance, transfer, or delivery continues to be postponed under subdivision 1 or 2 hereof.

4. To the heirs, devisees, legatees, executors, administrators, representatives, creditors, successors, or assigns of any person to whom payment, conveyance, transfer, or delivery continues to be postponed under subdivision 1, 2, or 3 hereof, except to such heirs, devisees, or legatees as are natural persons and have been nationals of the United States from June 1, 1934, to the time of payment, conveyance, transfer, or delivery, and except to such creditors as are not German nationals and are eligible claimants under section 9, subsections (a) and (e) of the Trading with the Enemy Act, as amended."

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
July 22, 1935.

[No. 7111]

UNITED STATES
COURT OF APPEALS FOR TH
OF COLUMBIA
FILED MAR 18 1936
CLERK

In The

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 6471

Deutsche Bank und Disconto-Gesellschaft, a Corporation, *Appellant*,

v.

Homer S. Cummings, Attorney General of the United States, and W. A. Julian, as Treasurer of the United States, *Appellees*.

BRIEF OF HOMER S. CUMMINGS, AS ATTORNEY GENERAL OF THE UNITED STATES, AND W. A. JULIAN, AS TREASURER OF THE UNITED STATES, IN SUPPORT OF MOTION FOR REARGUMENT.

James W. Morris,
Assistant Attorney General,

Leslie C. Garnett,
United States Attorney,

Harry LeRoy Jones,
Edward First,
Frank C. Sterck,
Attorneys, Department of Justice,

Attorneys for Appellees.

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Settlement of War Claims Act of 1928 (45 Stat. 254)	4 *et. seq.*
Trading with the Enemy Act (40 Stat. 411, 50 U. S. C. A. Appendix)	23, 27

IN THE

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT, *a Corporation*, *Appellant*, *v.* HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES AND W. A. JULIAN, AS TREASURER OF THE UNITED STATES, *Appellees.*	No. 6471

MOTION OF THE APPELLEES, HOMER S. CUMMINGS, AS ATTORNEY GENERAL OF THE UNITED STATES, AND W. A. JULIAN, AS TREASURER OF THE UNITED STATES, FOR REARGUMENT AND FOR STAY OF MANDATE.

Come now the appellees, Homer S. Cummings, as Attorney General of the United States and as successor in interest to the Alien Property Custodian, and W. A. Julian, as Treasurer of the United States, and move this Honorable Court to grant a reargument of the above-entitled cause for the reason that the lower court has no jurisdiction irrespective of whether Public Resolution 53 of the 73rd Congress has withdrawn the consent of the United States to be sued, for the reason that the Court's opinion involves im-

portant questions of the control of the Congress and the Executive over international relations and of the separation of powers of Government, and for other reasons assigned in the brief in support of this motion, which will be submitted within the next few days after the printing thereof, and that the mandate to the lower court be stayed for a period of thirty days from the date of the filing of this motion, for the purpose of this motion; and in the event that said motion is denied, that the mandate be stayed for the said period, pending the filing of an application with the Supreme Court of the United States for a writ of certiorari to review the decision of this Court.

JAMES W. MORRIS,
Assistant Attorney General.

LESLIE C. GARNETT,
United States Attorney.

HARRY LEROY JONES,
Attorney, Department of Justice.

EDWARD FIRST,
Attorney, Department of Justice.

FRANK C. STERCK,
Attorney, Department of Justice.

THOMAS H. CREIGHTON, JR., ESQ.,
Attorney for Appellant.

Please take notice that appellees are this 6th day of March, 1936, filing the foregoing motion.

IN THE

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT, *a Corporation, Appellant,*
v.
HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES AND W. A. JULIAN, AS TREASURER OF THE UNITED STATES, *Appellees.*
No. 6471

BRIEF IN SUPPORT OF MOTION FOR REARGUMENT.

The appellees have made this motion for reargument because of the extreme importance of the case—an importance recognized by the Court itself in the opinion. It will be submitted hereinafter that the Court's conclusion that the Settlement of War Claims Act conferred upon the appellant "vested" rights or "enforceable equity" rights is unwarranted. On the contrary, the only "rights" conferred by that act were political in nature and, as such, subject to subsequent impairment. Further, the attention of the court will be invited to a matter which may not have been fully appreciated from the briefs and oral argument of the parties, namely, that the action of the legislative and executive departments touching international relations

is not subject to judicial review. Finally, it will be urged that, irrespective of whether Public Resolution 53 expressly withdraws the consent of the United States to be sued, the court, nevertheless, is without jurisdiction to enter a decree for the return of property to a German national.

I.

THE "RIGHTS" CONFERRED UPON THE APPELLANT BY THE SETTLEMENT OF WAR CLAIMS ACT WERE POLITICAL IN NATURE AND THEREFORE ANY SUBSEQUENT IMPAIRMENT IS LAWFUL AND NOT SUBJECT TO JUDICIAL REVIEW.

The appellees urge that the appellant acquired no "vested" rights or "enforceable equity" rights either by the Settlement of War Claims Act, or even by virtue of any consent which may have been filed by the appellant pursuant to that act.[1] The "rights" conferred upon the appellant by the Settlement of War Claims Act were political in nature and therefore subject to subsequent impairment. However, even if "vested" rights, comparable to contract rights, were bestowed upon the appellant, these could be lawfully altered by the Congress in the exercise of a paramount power.

Turning to "the main question whether the Resolution is or is not violative of the provisions of the Fifth Amendment" (Opinion, p. 5) the Court devotes pages

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[1] The appellees desire to invite the attention of the Court to the fact that the *record does not show that any 20% consent was ever filed by this appellant.* Paragraph 9 of its petition (R. 3) does not so state. The record does not substantiate the appellant's statement on page 2 of its principal brief that such a consent was filed. This the appellant has recognized, and has asked this Court (pages 23 and 24 of its brief) to *infer* that the consent was actually filed

6 and 7 to three situations, distinguishing between the rights involved in each. The first concerns the creation of vested contractual rights, and the impossibility of destroying the same by direct legislation. *Coombes* v. *Getz,* 285 U. S. 434; and cases therein cited (Opinion, p. 6). This situation does not involve the exercise by the Congress of a paramount power, nor does it involve rights of an international nature of a predominate political character. Nor does it involve any mere postponement of payment, but a downright destruction of substantive rights. The second concerns rights which are in the nature of bounties, pensions and similar Congressional gratuities. These are subject to withdrawal at any time by subsequent legislation. See *Lynch* v. *United States,* 292 U. S. 571 (Opinion, p. 6).

The third situation is one in which all the circumstances amount to an irrevocable recognition of "an honorable obligation, sufficient to turn an unenforceable equity into a 'binding and effective provision.'" These principles the Court adopts as controlling in this case, premised upon the view that the consent to be sued had not been withdrawn (Opinion, p. 7). As an example, the opinion refers to the case of *United States* v. *Realty Co.,* 163 U. S. 427. It is respectfully submitted that that case is wholly inapplicable to the situation presented by the case at bar. In that case it appeared that the Congress, by an act of 1890 (26 Stat. 567, 1244), authorized the payment of a bounty to the producers and manufacturers of sugar. In reliance upon this act, many persons had incurred expenses or made financial commitments. In 1894 the act of 1890 was repealed. In 1895, the Congress nevertheless appropriated moneys to pay claimants who had complied under the original act of 1890. Thereupon, the Treasurer of the United States refused to pay the claimant

who had fully complied, despite the Congressional appropriation, on the ground that the Act of 1895 was unconstitutional. The Court, while asserting that it was doubtful if it were ever the province of the judiciary to question the legislative determination (p. 444), held that "there was enough in the case as presented to Congress upon which to base the assertion that there was a moral and honorable claim upon the public treasury which that body had the constitutional right to recognize and pay."

This Court in its opinion (page 7), referring to the *Realty Co.* case, states that:

> While little is said in the opinion about the repealing statute which there, as here, directed the Treasury not to pay the claim, it is noticed; and it is a safe assumption that the court would not have held the claim recoverable if the repealing act had been a valid obstacle.

This assumption, it is respectfully submitted, finds no support in the Supreme Court's decision. In the *Realty Co.* case Congress recognized the existence of an "honorable obligation" and thereupon by the Act of 1895, appropriated moneys *subsequent* to and despite the repealing Act of 1894. *The sole question before the Court was the power of the Congress, by the 1895 Act to recognize such claims as constituting debts payable by the United States* through appropriations under Article I, §8 of the Constitution. The validity or invalidity of the repealing Act of 1894, directing the Treasurer not to pay the claim, was not involved. In the instant case, however, the validity of the Act of 1934 directing the paying officers to postpone the payment of claims is of the greatest importance, and the appellees believe that it is not permissible to conclude

from a case upholding the right of the Congress to make an appropriation, that the Congress may not direct that payments be postponed or reserved for reasons which it deems sufficient. The courts have hitherto refused to question the power of the Congress to do this. See *Hart* v. *United States,* 118 U. S. 62 and argument, Point III.

The appellees emphasize, however, with all the vigor at their command, that no rights of any kind within the protection of the Fifth Amendment vested in any German national under the Settlement of War Claims Act *until his property was actually physically returned* to him.

The appellant states in its brief (Point I, p. 7) that

> It certainly cannot make any difference whether the property is physically returned or directed to be returned. If Congress had not in the Settlement of War Claims Act disposed of the property then Congress would have the power to change the disposition thereof, but having once vested title in the former owner it cannot make any changes in what is already a *fait accompli.*

This Court seems to have adopted this reasoning in its opinion (page 10).

It is submitted that this argument has been expressly discredited by the Supreme Court in a number of cases which involved factual situations akin to those in the case at bar.

In *United States ex rel Boynton* v. *Blaine,* 139 U. S. 306, a mandamus was sought to compel the Secretary of State to pay certain moneys in respect of an international claim allowed under the Act of July 4, 1868 (15 Stat. 679). Certain sums had previously been paid upon the award in favor of the claimant, but a payment of the balance remaining due was *postponed*

upon order of the President of the United States under powers given to him by §5 of the subsequent Act of June 18, 1878 (20 Stat. 144). The claimant, as does this appellant, vigorously urged that the award in his favor was a "final and conclusive adjudication;" that the "United States have not now and never have had any property, right or interest in the original claim or award;" and that "the President of the United States has now no lawful control over it and never had any lawful control over it excepting for a temporary purpose * * *."

The Supreme Court held that "these propositions have already been substantially disposed of by the decision of this court in *Frelinghuysen* v. *Key,* 110 U. S. 63." In that case, the Court stated that it had no doubt that the provisions of the Act as to the conclusiveness of the awards pursuant to the claims were "as strong as language can make them." Yet the court stated that no matter how final and conclusive the awards might appear on their face, "they are only so until set aside by agreement between the two governments *or otherwise.*" The court made this vital distinction (p. 73):

> None of the cases cited by counsel are in opposition to this. They all relate to the disposition to be made of the proceeds of international awards *after they have passed beyond the reach of the governments and into the hands of private parties.* (Italics supplied.)

Reaffirming this principle, the Supreme Court stated in *Boynton* v. *Blaine, supra,* at p. 325:

> So long as the political branch of the government *had not lost its control over the subject matter by final action,* the claimant was not in a posi-

> tion, as between himself and his government, to insist on the conclusiveness of the award as to him. (Italics supplied.)

Upon the authority of these cases the appellant can not successfully contend that there exists no difference in principle between property actually delivered or "physically returned" and property permitted by the Congress to be returned pursuant to final action.[2] Are not all of the numerous provisions in the Act with which appellant must comply *prior* to any return—beginning with the fundamental proof of ownership and culminating with the consent to partial retention—are not all of these conditions obviously consistent with the continued ownership of the United States until the final action with regard to the property is taken, to-wit, its actual payment by the Treasurer?

Moreover, in no case cited by the appellant or in the Court's opinion are *political* as opposed to ordinary contractual or proprietary rights involved.

This Court said in *United States ex rel Angarica* v. *Bayard,* 4 Mackey 310, 322 another case involving an international claim:

> * * * We intend, therefore, merely to say that, however strong this obligation may be in a political sense, *it contains none of the elements of what is known to the courts as contract;* and that much less can it be held by the courts that an indemnity, obtained by the state for the benefit of an injured citizen, becomes in a legal sense at

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[2] The attention of the Court is invited to the fact that these cases stand for the principle that the Congress may direct that payment of an award *to an American citizen* be postponed, and that the political departments have absolute control over the subject matter of the award until actually physically received by such citizen. *A fortiori,* the Congress may by an act of State impose similar if not greater limitations upon the right of an alien enemy to realize upon an award.

> once the property of that citizen, or property held for his use. *The phrases and analogies of municipal law are constantly found to be misleading in such matters.* This transaction established in that sense neither a debt nor a trust nor any trustee. (Italics supplied.)

In *Chae Chan Ping* v. *United States,* 130 U. S. 580, it appeared that the Congress had passed an act prohibiting those Chinese laborers who had departed from the country from reentering despite the fact that these laborers had been granted certificates issued under a prior act, entitling them to return and to reenter. This Act of Congress was contrary to the provisions of a treaty between the United States and China, and the certificates were regarded as conferring something in the nature of vested "contractual" rights. But the court sustained the prohibition. The "rights" previously conferred were based upon political considerations and as such subject to change. The court said (p. 601):

> It will not be presumed that the legislative department of the Government will lightly pass laws which are in conflict with treaties of the country; but that circumstances may arise which would not only justify the government in disregarding their stipulations but demand in the interest of the country that it should do so, there can be no question. *Unexpected events may call for a change in the policy of the country.* (Italics supplied.)

The "rights" which the appellant insists it derived from the Settlement of War Claims Act are political in nature, and were granted in the exercise of the control by the Congress over international relations. When the Congress, invested with plenary power over foreign relations, acts with reference to such political

"rights," its action in this regard is wholly one of foreign policy, international in aspect, and the propriety of such action is not subject to judicial inquiry or decision. It certainly could not be successfully argued that the "rights" which the appellant received under the Settlement of War Claims Act are any different from those it would have received had the terms of the Settlement of War Claims Act been contained in a treaty negotiated between the United States and the German Reich. Yet it is horn-book law that such rights as are acquired by an alien pursuant to treaty are political and not proprietary in the sense that any impairment is judicially examinable.

As stated by the court in *Chae Chan Ping* v. *United States, supra* (p. 609):

> *Whether a proper consideration by our Government of its previous laws,* or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition * * * *are not questions for judicial determination.* If there be any just ground of complaint on the part of China, it must be made to the political department of our Government, which is alone competent to act upon the subject. (Italics supplied.)

The question was likewise fully considered in *Taylor* v. *Morton,* 2 Curtis 454, 460, 461 (U. S. C. C.) affirmed, 2 Black 481, wherein Mr. Justice Curtis stated:

> If Congress legislates in subordination to the treaty, viewed as municipal law, it is not material what its reasons were for legislating in contravention of the treaty. If the other party to it, had by similar legislation, in admitted or plain disregard of the treaty, afforded the amplest reasons for counter legislation, how could this Court take notice of or weigh those reasons?

> Is it a judicial question * * * whether the views and acts of a foreign sovereign, manifested through his representative have given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise? *I apprehend not. These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our government.* They belong to diplomacy and legislation, and not to the administration of existing laws. (Italics supplied.)

Thus in the instant case, Germany, "in plain disregard" of its obligations under the Debt Funding Agreement of 1930, has "afforded the amplest reasons for counter-legislation," namely, Public Resolution 53. And likewise, this court may not be called upon to weigh the reasons which prompted the Congress to suspend further returns of property under the Settlement of War Claims Act.

Chief Justice Marshall, in *Foster* v. *Neilson,* 2 Peters 253 (at page 309), stated that:

> If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the Legislature has acted on the construction thus asserted, *it is not in its own courts that this construction is to be denied.* (Italics supplied.)

Is the rule different in the instant case because the Legislature and Executive "have unequivocally asserted its rights of dominion" over *enemy property*

rather than over land as in the *Foster* case? In the *Foster* case, the land concerned was property in the United States "of which it is in possession and which it claims under a treaty." In the instant case, the property concerned has been and is in the possession of the United States; and it not only claims possession of the same pursuant to treaty but it was expressly given all right of detention and postponement of return or any other disposition thereover by treaty. (See Point II-A, appellees' principal brief.)

Even assuming arguendo that "vested" rights, comparable to contract rights, were bestowed upon the appellant, these could be lawfully altered by the Congress in the exercise of a paramount power. In *Lynch* v. *United States,* 292 U. S. 571, the Supreme Court held invalid a portion of the Economy Act of 1933, which repealed prior laws granting war risk insurance, on the ground that the Congress could destroy existing contract rights against the United States only in the exercise of its police power or other paramount power, and that such exercise was not apparent or even claimed in the case before the Court. Mr. Justice Brandeis, for a unanimous court, said (p. 579):

> As Congress had the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, *unless, indeed, the action taken falls within the federal police power or some other paramount power.*
>
> The Solicitor General does not suggest either in brief or argument, that there were supervening conditions which authorized Congress to abrogate these contracts in the exercise of the police or any other power. * * * (Italics supplied.)

In the case at bar, there were supervening conditions

which authorized Congress, in the exercise of a paramount power to alter any "rights" which may previously have been conferred.

Even the States, which are specifically forbidden to impair the obligations of contracts, may interfere with or abrogate existing contracts in the exercise of sovereign powers. Laws prohibiting lotteries, the sale of intoxicating liquors, or the maintenance of nuisances, zoning laws, laws regulating rates and services of utilities, and numerous other enactments, may all have the effect of destroying contracts, but they are none the less valid.[3]

In *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 435, Mr. Chief Justice Hughes thus summarized this power of the States to affect existing contracts:

> Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. * * *

Even greater power, it has been suggested, is reserved to the Congress to affect contracts, since there is no prohibition in the Constitution against impairment by the national legislature. *Legal Tender Cases,* 12 Wall. 457, 550; *Mitchell* v. *Clark,* 110 U. S. 633; *Evans-Snider-Buel Co.* v. *McFadden,* 105 Fed. 293, 297;

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[3] *Long Island Water Supply Co.* v. *Brooklyn,* 166 U. S. 685, 692; *Manigault* v. *Springs,* 199 U. S. 473, 480; *Atlantic Coast Line R R. Co.* v. *Goldsboro,* 232 U. S. 548, 558; *Chicago & Alton R. R. Co.* v. *Tranbarger,* 238 U. S. 67, 76-77; *Union Dry Goods Co.* v. *Georgia Pub Serv. Corp.,* 248 U. S. 372, 376; *Producers Transp. Co.* v. *R. R. Comm. of California,* 251 U S. 228, 232; *Levy Leasing Co.* v. *Siegel,* 258 U. S. 242; *Sutter Butte Canal Co.* v. *Railroad Comm.,* 279 U. S. 125, 138; *Stephenson* v. *Binford,* 287 U. S. 251, 276; *St. Paul Fire & Marine Ins. Co.* v. *Eldracher,* 33 F. (2d) 675 (C. C. A. 8th), cert. den., 280 U. S. 604.

United States v. *United Shoe Mach. Co.*, 264 Fed. 138, 152.

It is clear, at all events, that no exercise of a paramount power of the Congress has been invalidated because it interfered with or destroyed existing contracts. Numerous Acts of Congress having such purpose and effect have been sustained. A familiar example is Federal bankruptcy legislation. See *Hanover National Bank* v. *Moyses*, 186 U. S. 181.

But other legislation may also affect or destroy existing contracts. Thus in *Louisville & Nashville Railroad* v. *Mottley*, 219 U. S. 467, a law was upheld, as applied to prior contracts, which prohibited the use of free passes on interstate railroads. In that case, the pass, which had been given a number of years before, was not a mere gift but was in the nature of a satisfaction of a disputed claim against the railroad for personal injury. Hence, there was a clear abrogation of an existing contract by Federal law.

In *Philadelphia, B. & W. R. R. Co.* v. *Schubert*, 224 U. S. 603, the Supreme Court upheld the power of the Congress in the Employers' Liability Acts to abrogate existing contracts making receipt of benefits under a company relief plan a bar to an action for damages. In that case, the plaintiff became a contributor to such a fund before the enactment of the Act of Congress, and received a benefit from the fund after the Act became effective. In holding that he was not barred from bringing an action for damages, in the face of the prior agreement, Mr. Justice Hughes said (pp. 613-614):

> The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the Territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations

> which would conflict with the execution of its policy. To subordinate the exercise of the Federal authority to the continuing operation of previous contracts, would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals, and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegate power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which as to future action should transcend all inconsistent provisions. *Prior arrangements were necessarily subject to this paramount authority.* (Italics supplied.)

In *Calhoun* v. *Massie,* 253 U. S. 170, the Supreme Court upheld an Act of Congress limiting the fees which could be charged by attorneys representing claimants of Civil War benefits. In that case the attorney's contract had been made and the major part of his services had been performed before the Act was passed. The Act, nevertheless, was held valid as applied to that contract.

The power of the Congress may be exercised in such a way that even contracts between private parties and a State may be abrogated. Thus in *New York* v. *United States,* 257 U. S. 591, the Supreme Court upheld an order of the Interstate Commerce Commission increasing an intrastate rate even though the state charter of the railroad provided that a lesser rate should be the maximum charged by the company. See also *Omnia Commercial Co.* v. *United States,* 261 U. S. 502; *Scranton* v. *Wheeler,* 179 U. S. 141; *Union Bridge Co.* v. *United States,* 204 U. S. 364.

In *Dillingham* v. *McLaughlin,* 264 U. S. 370, 374, Justice Holmes tersely said:

> The operation of reasonable laws for the protection of the public cannot be headed off by making contracts reaching into the future.

In *Norman* v. *B. & O. R. Co.,* 294 U. S. 240, Mr. Chief Justice Hughes said (page 307-308):

> Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.

So may it be said in the case at bar, that whatever "rights" were given to the appellant by the Settlement of War Claims Act, they were "rights" which contained a "congenital infirmity." If unexpected events call for a change in the policy of the country, it was for the Congress in the exercise of its power over international relations, to effectuate that change. In the exercise of this paramount power, the Congress, is and necessarily must be unfettered.

In *Newton* v. *Commissioners,* 100 U. S. 548, it appeared that a legislature had entered into an agreement to establish the county seat in a community, conditioned upon the performance of certain acts by that community. After these acts were performed, legislation was enacted providing for the removal of the county seat. In upholding that statute the Supreme Court declared at page 559:

> They involve *public interests*, and legislative acts concerning them are necessarily *public laws*. Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil.

One Congress cannot convey, or contract, or legislate away the powers intrusted by the Constitution so as to restrict the exercise of those powers by a subsequent Congress.

It is respectfully submitted accordingly that the "rights" conferred by the Settlement of War Claims Act were political in nature and therefore subject to subsequent impairment, but even if it be admitted that "vested" rights, comparable to contract rights, were bestowed, then these too could be lawfully altered by the Congress in the exercise of a paramount power.

II.

THE DUTY OF THE CONGRESS AND THE EXECUTIVE TO PROCURE SATISFACTION BY GERMANY OF THE AWARDS OF THE MIXED CLAIMS COMMISSION IS A POLITICAL ONE WHICH THE JUDICIARY SHOULD NOT EMBARRASS.

The obvious purpose of Public Resolution 53 is political. The Congress intended to provide for the continued retention of the security held for the benefit of American claimants, holders of awards by the Mixed Claims Commission, which retention Germany had agreed to in the Treaty of Berlin. The Congress intended likewise to exert pressure upon Germany through the medium of stopping payments to her nationals. (See Appendix I, Appellees' Reply Brief.) These nationals will in turn complain to their own government, and exert their influence to compel Germany to fulfill her obligations under the Debt-Funding Agreement of 1930. This duty of the Congress and the President to procure redress for American citizens who have suffered injuries at the hands of Germany is a political duty. This Court stated in *Holzendorf* v. *Hay,* 20 App. Cas. 576, at page 580:

> * * * The duty of righting the wrong that may be done to our citizens in foreign lands is a political one, and appertains to the executive and legislative departments of the government. The judiciary is charged with no duty and invested with no power in the premises. * * *

It certainly can not be denied that any decree in the instant case ordering the return of property to a Ger-

man enemy corporation in defiance of the mandate of the Congress would be a great embarrassment to the President in negotiating with Germany for a new funding agreement, or for further payments under the present one. See *Burnet* v. *Brooks,* 288 U. S. 378, 396, quoted at page 18 of the appellees' brief.

The delicate nature of the issues presented by the instant case may be gathered from a treatment of political questions in an article entitled "Judicial Self Limitation" appearing in 37 Harvard Law Review 338. At p. 347, the writer, Maurice Finkelstein, says:

> Perhaps the only class of cases which courts have unanimously agreed to refrain from interfering with, is that great group of matters involving foreign relations of the United States with other nations. It is hardly necessary to argue the propriety of this attitude. A very recent case, *Commercial Trust Company of New Jersey* v. *Miller,* decided April 23, 1923, brings this proposition out very clearly. In that case the question before the court involved the continuation of the wartime powers of the Alien Property Custodian after July 2, 1921, the date on which the President approved the joint resolution of Congress which declared the state of war between the United States and Germany to be at an end. The court, speaking through Mr. Justice McKenna, said as follows:
>
> "A court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time, and that its consequences are so far swallowed up that legislation addressed to its emergency had ceased to have purpose or operation with the cessation of the conflicts in the field."
>
> As to that matter Congress is the final arbiter. If it sees fit to continue wartime measures to help solve problems yet unfinished, the courts cannot interfere.

Another writer, Melville Fuller Weston, in 38 Harvard Law Review 296, in an article, "Political Questions," says of international relations:

> The rule whereby the courts accept as their guide the decisions of the other two departments upon questions involving international relations is fairly well settled.
>
> "Whenever an act done by a sovereign in his sovereign character is questioned it becomes a matter of negotiation, or of reprisals or of war."
>
> "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." (pp. 315-316.)

In commenting upon Mr. Finkelstein's reference to the *Commercial Trust Co. Case,* Mr. Weston states:

> *Commercial Trust Co. of New Jersey* v. *Miller,* although similarly based upon the general power of the President and Congress to deal with foreign affairs, presents a somewhat different problem. War with Germany was brought to an official close by a joint resolution of Congress with the President's approval, on July 2, 1921, followed by a proclamation of peace on August the twenty-fifth. After those dates the Alien Property Custodian sought under the Trading with the Enemy Act to seize a trust fund held for the benefit of a German citizen. Congress had expressly provided that the Act should persist, and that all property subject thereto should remain in the control of the United States, 'until such time as the Imperial German Government . . . shall have . . . made suitable provisions for the satisfaction of all claims.' The Court said:

"The power which declared the necessity is the power to declare its cessation, and what the cessation requires. The power is legislative."

The natural approach of the case is, then: the power to make war is delegated to the executive and legislative branches; subject only to the restraints of popular disapproval, they may make it when they wish and prolong it accordingly; many unusual acts are valid in time of war, including the Act in question; the consequences of many such acts, including the one in question, almost necessarily will endure after the actual cessation of hostilities; it would be very unsatisfactory to have no authority capable of dealing with these consequences, of finishing the work begun; by maintaining a technical state of war, time could be gained for this purpose; if ever the greater includes the less, the war power includes the power to dispense with that embarrassing technicality. (pp. 319, 320.)

Applying these principles to the instant case, the propriety of stopping payments to German nationals is a question solely for the Congress to determine;[4] nor may our courts be called upon by a non-resident German enemy to hinder the President in his political function of negotiating with the German Government for a continuance of her payments to the United States for the benefit of those of our citizens who have suffered injury at her hands during the progress of the war.

In this case, the Court has found that "The Resolu-

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[4] For further discussion of political questions, see CORWIN, THE PRESIDENT'S CONTROL OVER FOREIGN RELATIONS, p. 163; Dickinson, *International Political Questions in the National Courts*, 19 AM. J. INT. LAW 157; Field, *The Doctrine of Political Questions in the Federal Courts*, 58 AM. L. REV. 711; WRIGHT, ENFORCEMENT OF INTERNATIONAL LAW THROUGH MUNICIPAL LAW IN THE UNITED STATES, pp. 17, 19, 25, 28, 29, 44, 48, 84, 86, 92, 101, 106, 143, 201, 218.

tion is not confiscatory of the property here in suit." (Opinion, p. 5.)

No clearer case could be presented for judicial forbearance.

III.

IRRESPECTIVE OF WHETHER PUBLIC RESOLUTION 53 EFFECTS A WITHDRAWAL OF CONSENT TO BE SUED, THE COURT IS NEVERTHELESS WITHOUT JURISDICTION TO DECREE A PAYMENT AND RETURN.

A. The Court Has No Jurisdiction Because the Congress Has Directed That Any Decree for a Return of the Property be Ignored.

The appellees argued in their principal brief, point I (p. 6), that the court has no jurisdiction of the appellant's complaint because upon application of the appellant, the President, acting through the Alien Property Custodian, had once ordered the return of the property, and hence, that a failure to so order, a necessary condition precedent to a right of action, had not occurred. (§9 (a) of the Trading with the Enemy Act permits suits, where an application has been made to the President, only "*if the President shall not so order* * * *.")

It was urged in the oral argument that the only consent to suit which the Congress had granted was one "to establish the interest, right, title" of the claimant in the property demanded. It is only where there is a contested or an undetermined interest in the property that a court may take jurisdiction. The statute permits entry of a decree for the return only if this in-

terest, right, or title is "so established." In holding that the lower court has jurisdiction,[5] the Court seems to assume that a mere failure of delivery of the property, after application to the President, is sufficient to bring a claimant within the jurisdictional clause. (Opinion, last paragraph, p. 3.)

The appellees would respectfully request the Court to modify its opinion to include a discussion of this aspect of the jurisdictional provisions of §9(a) in order to make it clear whether this appellant is deemed to fall within the express limitations of the jurisdiction conferred, despite the fact that the President, by his agent, had once ordered the return of the property in question, and despite the fact that there is no question of any "interest, right, or title" to be decided by the court.

The Court has concluded that since Public Resolution 53 contains no express terms withdrawing consent to be sued, that "it follows necessarily that the lower court was in error in dismissing the bill" (p. 5). But, quite to the contrary, it is submitted that no such conclusion follows.

Jurisdiction in actions against the United States may be destroyed in other ways. *It is sufficient that the Congress has directed that any judgment of the court directing a return of property be not complied with.*

In *Hart* v. *United States*, 118 U. S. 62, a joint resolution of the Congress of impelling similarity to Public

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[5] This conclusion seems to be based upon a consideration of the provisions of the Trading with the Enemy Act, §9 (a) and §17. The exclusive remedy of a claimant is under §9. (See appellees' principal brief, Point I (a), p. 5.) Section 17 does not *confer* jurisdiction except that if the court has jurisdiction "to establish the interest, right, title or debt so claimed" under §9, then the court may "make and enter * * * all such orders and decrees, and * * * issue such process as may be necessary and proper * * * to enforce the provisions of this act."

Resolution 53 was involved. An Act of March 2, 1867 (14 Stat. 571), provided:

> Until otherwise ordered, it shall be unlawful for any officer of the United States Government to pay any account, claim, or demand against said Government, which accrued or existed prior to the 13th day of April, A. D. 1861, in favor of any person who promoted, encouraged, or in any manner sustained the late rebellion; * * * (p. 97.)

Proceedings were instituted in the Court of Claims on such a claim. That court stated (16 Ct. Cls. 459, 484-485):

> Should the head of a department be in doubt (as was the case in *Padelford's Case,* 9 Wall. 531) whether a claimant comes within the excluded class, he may refer the case to this court. It would then become our duty to take jurisdiction; but as soon as the fact is ascertained that the claim is within the prohibition of the resolution of 1867, the court must say that, being a claim which the Executive was forbidden to pay, its reference does not confer jurisdiction to proceed with it to final judgment. With this modification, induced by the recent argument, we repeat the former expression of our views: (15 Ct. Cls. 414.)
>
> "That would be making the Treasury do indirectly what Congress has said it cannot do directly. Were we to render judgment in the claimant's favor on such claims we should invite the officers of the Treasury to do an act, under cover of our judgment, which Congress plainly intended that they should not have authority to do in any contingency. * * * ."

The Supreme Court approved these views, stating that:

> "We are of the opinion that the judgment of the Court of Claims was right. *It was entirely within the competency of Congress to declare that the claims mentioned in the Joint Resolution should not be paid till the further order of Congress.*" (Italics supplied.)

While that case arose from a reference to the court by the Secretary of War, no reason is seen why different principles would be applicable in a case originating in the court upon the claimant's petition. This follows from a consideration of the Supreme Court's opinion in *District of Columbia* v. *Eslin,* 183 U. S. 62, quoted on page 12 of the appelles' brief. *The doctrine of that case would likewise seem to deprive this Court of appellate jurisdiction,* the Supreme Court stating:

> The present cases were brought under the act of 1895, and were determined with reference to its provisions. In view of the repeal of that act by Congress, the requirement that pending proceedings be vacated, and *the express prohibition of the payment of judgments theretofore rendered, any declaration by this court as to the correctness of the final judgment* entered by the Court of Claims under the act of 1895 would be useless for every practical or legal purpose, and *would not be in the exercise of judicial power* within the meaning of the Constitution. (p. 86.) (Italics supplied.)

B. No Effective Decree Can be Entered Because the Mandate of Public Resolution 53 Is Directed to the President Who Can Not be Joined as a Party Defendant.

Another jurisdictional question of equal importance is presented by the Court's opinion, namely, can a

decree be entered directing an agent of the President to perform an act when the Congress has charged the Executive with the duty of preventing the performance of that very act? It is submitted that this is beyond the power of the judiciary.

The Alien Property Custodian is not vested with any power or authority under the Trading with the Enemy Act in his own right. He is merely the holding and managing agent for the President. It is the President himself who is invested with all power and authority to administer the Act. See §§ 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 16, 19, 20, 21, 23. This power is conferred upon the President as the Commander-in-Chief, as the repository under the Constitution of control over international relations[6] and as the exclusive recipient of such powers over international relations as the legislative branch may bestow upon the executive branch of the Government. (*Cf. Stoehr* v. *Wallace,* 255 U. S. 240; *Chemical Foundation* v. *United States,* 272 U. S. 1; *in re Garvan,* 270 Fed. 1002.) Section 6 provides for an Alien Property Custodian to act as an agent of the President:

> The President is authorized to appoint, *prescribe the duties of,* and fix the salary (not to exceed $5,000 per annum) of an official to be known as the alien property custodian, who shall be empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned, or delivered to said custodian under the provisions of this Act; and to hold, administer, and account for the same *under the general direction of the President* and as provided in this Act. * * * (50 U. S. C. A. Appendix § 6.)

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[6] Constitution, Art II, Sections 1, 2 and 3. See CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS, p. 2.

Thus the primary mandate of the Congress in all matters respecting alien property under administration is directed to the President. The Congress has expressly reposed the exclusive administrative or quasi-judicial function of returning enemy property in the President alone. Section 9 (b) provides that if the President shall make the appropriate determinations of ownership and citizenship or other qualification of the claimants according to the twenty-two various classes thereof, "Then the President, without any application being made therefor, may order the payment, conveyance, transfer, assignment, or delivery of such money or other property held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine such person entitled * * *." The only power or authority which may be exercised by the Alien Property Custodian or his successor in interest is that conferred upon him by the President. The action of the Alien Property Custodian in the instant case in determining the ownership of the appellant's property and the appellant's right to its return was authorized by President Coolidge in Executive Order No. 4862, dated April 23, 1928 (Appellee's Brief, Appendix C). This authority of the Alien Property Custodian may, of course, be changed or completely revoked at the pleasure of the Executive.

Accordingly, when in Public Resolution 53 the Congress enacted that "all payments, conveyances, transfers or deliveries of money or property * * * whether or not a judgment or decree has been entered with respect thereto, shall be postponed and the money or property or the income, issues, profits, and/or avails thereof reserved" the mandate of the Congress was addressed to the President, and to the appellees only

in so far as they may be specifically authorized by the President to act with respect to the return of enemy property. Public Resolution 53 must be deemed to annul any authority which may have been bestowed by the President upon the Alien Property Custodian to return enemy property to German nationals.

It is possible, in arriving at its conclusion that the lower court has jurisdiction of the appellant's complaint, that this Court considered Public Resolution 53 plus the subsequent refusal of the Attorney General to return the property, as tantamount to the statutory condition precedent: "If the President shall not so order * * *," or, indeed, as equivalent to an order by the President *not* to return the property.

Any decree directing a return of the property, addressed to these appellees, in this view of the case, would be directing them as agents, to do an act forbidden by their principal. It is fundamental that where the Congress reposes the power and responsibility of performing a governmental function in a specifically named officer, a court can not control that performance by a decree addressed to a subordinate. In *Webster* v. *Fall,* 266 U. S. 509, a case in which it was sought to compel two subordinates of the Secretary of the Interior to pay certain moneys to the plaintiffs, the Supreme Court stated:

> But the suit was one which required the presence of the Secretary, and the bill should have been dismissed for want of a necessary party. Gnerich v. Rutter, 265 U. S. 388, 68 L. ed. 1068, 44 Sup. Ct. Rep. 532; Warner Valley Stock Co. v. Smith, 165 U. S. 28, 34, 41 L. ed. 621, 623, 17 Sup. Ct. Rep. 225. *The statutory direction to cause quarterly payments to be made* (subject to §2087) *is addressed to the Secretary. The power and responsibility are his.* Neither Wright nor Wise

> have any primary authority in the matter. *They can act only under, and in virtue of, the Secretary's general or special direction.* In the absence of it, no payments or disbursements properly can be made. Authority in the superintendent to supervise such payments is not authority to cause them to be made. The statement of this court in the Gnerich Case (p. 391) is pertinent here: "They act under his direction, and perform such acts only as he commits to them by the regulations. They are responsible to him and must abide by his direction. What they do is as if done by him. He is the public's real representative in the matter, and, if the injunction were granted, his are the hands which would be tied." (p. 510.) (Italics supplied.)

The principle of *Webster* v. *Fall, supra,* is equally applicable to the instant case. The Attorney General can act only under, and in virtue of, the President's "general or specific direction." "The power and responsibility" are the President's.

The same principles are as applicable in mandamus as equity cases. Indeed, the instant case, in which the court is not called upon to make the statutory determination of "the interest, right, title" in the property claimed, more nearly resembles a mandamus than an equity action. In *Butterworth* v. *United States,* 112 U. S. 50, the Supreme Court said, at page 54:

> It is clear enough that if the action of the Commissioner of Patents, in the matter of controversy, is subject to the order of the Secretary of the Interior, the judgment of the Supreme Court of the District of Columbia must be reversed; for *mandamus* evidently will not lie to compel a public officer to do a particular thing which his superior in authority has lawfully ordered him not to do.

The President could, tomorrow, divest the Attorney General of all his functions as successor in interest to the Alien Property Custodian and place them upon, say, for example, the shoulders of the Secretary of State. Surely it could not be said that the Attorney General, as successor in interest to the Alien Property Custodian, is any less the agent of the President under the Trading with the Enemy Act than is the Secretary of State under R. S. 202. (5 USCA §156.) In *Holzendorf* v. *Hay*, 20 App. Cas. 576, an action to mandamus the Secretary, this Court has said:

> The latter is the confidential, political agent of the President for the execution of his will in matters committed to his discretion by the Constitution. To coerce the action of the Secretary, therefore, is to attempt the coercion of the President; and, as was said in *Marbury* v. *Madison* (1 Cr. 137, 166): "Nothing can be more perfectly clear than that their acts are only politically examinable." (p. 581.)

It has thus long since been established that neither mandamus, injunction or other court process will issue against the President. *Marbury* v. *Madison*, 1 Cr. 137, 166; *Mississippi* v. *Johnson*, 4 Wall. 475. Since the President, an indispensable party, can not be joined as a defendant, it is submitted that the court is without jurisdiction to enter an effective decree.

In the instant case, we can not deem the consent to sue the agents of the President embodied in §9(a), (b) and (c), as a consent to sue the agents to compel them to perform an act contrary to the mandate of the Congress and forbidden by the President.

It may be, as conceded by the appellees upon oral argument, that Public Resolution 53 is consistent with

the continued jurisdiction of the court to entertain suits for the determination of the "right, title and interest" of adverse claimants in property; but to say that the Congress has not withdrawn from the courts the power to enter mandatory decrees directing the payment of money or return of property to German nationals, is to assert that the Congress has enacted nonsense.

CONCLUSION

In conclusion, therefore, the appellees urge that their motion for reargument should be granted, and that the decree of the lower court should be affirmed.

Respectfully submitted,

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